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Supreme Court, U.S.
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No. _____

In the
United States Supreme Court
October Term, 1990

MARCIE McINTIRE,

Petitioner,

v.

THE STATE OF MINNESOTA, MINNESOTA HOUSING FINANCE AGENCY; JAMES SOLEM, Individually and in his official capacity as its EXECUTIVE DIRECTOR; HENRY WESLEY, Individually and in his official capacities as its PERSONNEL DIRECTOR; MICHAEL HALEY, Individually and in his official capacities as DIRECTOR OF HOME MORTGAGE PROGRAM,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

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QUESTIONS PRESENTED

1. Can a state court weigh factual issues on summary judgment, in conflict with federal appellate authority, under the *Pickering* balancing test for qualified immunity on claims for violation of a public employee's free speech rights under 42 U.S.C. Section 1983 and the First and Fourteenth Amendments of the United States Constitution?

2. Does a probationary public employee have a protectible right to continued employment free from termination based upon speech under 42 U.S.C. Section 1983 and the Fourteenth Amendment of the United States Constitution?

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ON PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Petitioner Marcie McIntire respectfully prays this Court to issue a Writ of Certiorari to review the opinion of the Court of Appeals of Minnesota dated August 7, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals of Minnesota is reported at 458 N.W. 2d 714 and is reprinted herein as Appendix A. The opinion of the Court of Appeals in *McIntire* I is reported at 419 N.W. 2d 799, and is reprinted herein as Appendix B. The order and decision of the State Trial Court is unreported and attached hereto as Appendix C.

JURISDICTION

The judgment of the Court of Appeals of Minnesota was entered on August 7, 1990. A Petition for Review filed by Plaintiff's attorney was denied on September 28, 1990 by the Minnesota Supreme Court. See Appendix D. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following Constutional provisions and Statutes are quoted in Appendix E:

42 U.S.C. Section 1983, civil action for deprivation of rights.

First Amendment of the United States Constitution.

Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

This case presents important questions addressing a state court's conflicting interpretation of 42 U.S.C. Section 1983 and the First and Fourteenth Amendments of the United States Constitution from existing federal appellate authority on individual Defendants' claims for qualified immunity. Plaintiff requests the Supreme Court grant Certiorari in order that the federal laws governing 42 U.S.C. Section 1983 and the First and Fourteenth Amendments for her claims for violation of free speech rights receive the same interpretation and treatment in state court as they would in federal court.

Marcie McIntire, an American Indian, was employed as the Indian Housing Coordinator at the Minnesota Housing Finance Agency (MHFA) from July 2, 1984, until her discharge for "willful misconduct" on February 15, 1985. As the Indian Housing Coordinator, Ms. McIntire was responsible for overseeing certain programs designed to benefit American Indians in Minnesota in terms of housing and financing. Ms. McIntire's immediate supervisor was Michael Haley, the Director of the Home Mortgage Division, who reported to the Executive Director, James Solem. The Personnel Director at the time was Henry Wesley.

Marcie McIntire was hired as an entry level Housing Development Officer on an intitial six month probationary period scheduled to conclude January 2, 1985. At the end of her probationary period, she would be certified as a permanent employee with the State of Minnesota under a collective bargaining agreement between the State and the Minnesota Association of Professional Employees (MAPE). Ms. McIntire's position required her to work with the St. Paul Inter-Tribal Housing Board (SPITHB) that was experiencing problems of fiscal mismanagement. Ms. McIntire saw operational problems within the SPITHB and recognized activity breaching the contract with the MHFA. The SPITHB received contractual funding allocated by the

Minnesota State Legislature for particular Indian housing programs. Some of the problems of the SPITHB observed by Ms. McIntire included unauthorized salary advances to staff, improper housing loans by the SPITHB to members of its own Board of Directors, an improper $27,000 loan by the SPITHB to one of its Directors for construction of a personal driveway, and numerous others. At one point, the SPITHB misdirected part of $425,000 allocated for a segregated account designated specifically for Section 8 housing funds. These problems existed during Ms. McIntire's tenure with the Agency and were not resolved.

Despite difficulties and mismanagement by the SPITHB, the Agency continued to fund the organization. Michael Haley advocated continued funding of the SPITHB to his supervisors and to the Board of Directors of the Minnesota Housing Finance Agency throughout the fall of 1984.

Marcie McIntire was criticized by Haley during fall of 1984 for statements she made in her position. These included statements at certain public meetings that contradicted Haley. Haley also criticized her for speaking out at meetings of the Board of Directors of the Minnesota Housing Finance Agency without first consulting with him. One incident involved Ms. McIntire questioning the use of outdated census material.

The Minnesota Legislative Auditor's Office conducted an examination of SPITHB improprieties during fall of 1984. The investigation utilized information provided by the MHFA itself in addressing improprieties. The Legislative Auditor issued its report on the SPITHB on December 4, 1984.

When the problems inherent with the SPITHB continued without remedy, Ms. McIntire was advised by Senate Counsel to prepare a memorandum detailing the problems within the SPITHB. She prepared a detailed memorandum outlining the improprieties at the SPITHB more inclusive than that of the Legislative Auditor. On December 4, 1984, she finished her memorandum on the SPITHB.

On December 7, 1984, Haley retrieved several envelopes

from the outgoing mail addressed to persons outside of the Agency. One of these was addressed to Senate Counsel. Inside, Ms. McIntire had included her own memorandum of December 4, 1984 outlining repeated mismanagement by the SPITHB. Ms. McIntire mailed her memorandum later that day along with copies of the Legislative Auditor's report and placed a copy on Haley's desk. The outgoing memoranda were sent to six individuals outside the Agency, including a Union Representative and members of the Indian Community.

On January 10, 1985, Haley sent a memo to Henry Wesley directing that Ms. McIntire's probationary period be extended an additional five hundred twenty hours for "significant errors in judgment, inability to accept criticism or direction, and poor communication with her supervisor." In the memo, Haley listed various "judgment errors" that occured during fall of 1984 that Ms. McIntire was to correct or to discontinue. She was further required to eliminate these "judgment errors" in order to become a certified employee.

On January 14, 1985, Haley directed another memorandum to Wesley discussing Ms. McIntire's extended probationary period. Haley and Wesley set forth additional terms and conditions for Ms. McIntire to satisfy in order to become certified as a permanent employee at the Agency. The January 14, 1985 memorandum restricted Ms. McIntire from publicly disagreeing with the Agency, engaging in unauthorized distribution of internal and external communications and correspondence, "inappropriate public commentary", and other terms. These two memos, apparently, were in reponse to Marcie McIntire's initial six months and were to operate prospectively.

Ms. McIntire remained at the Agency during January, 1985 until February 15, 1985 when she received a memo from Personnel Director Wesley terminating her for "willful misconduct". Haley asserted he received information, after his two January, 1985 memoranda, that Plaintiff had, in fact, distributed her December 4, 1984 memo within the community. In terminating Plaintiff, Wesley attached the

January 10 and 14 memos to his termination memo of February 15, 1985, and indicated Ms. McIntire had "continued to engage in actions that these memos state that you were not to".

Marcie McIntire commenced an action against the Minnesota Housing Finance Agency, Executive Director James Solem, Home Mortgage Director Michael Haley, and Personnel Director Henry Wesley, individually and in their official capacities, for violation of her free speech rights under 42 U.S.C. Section 1983 and the First and Fourteenth Amendments and denial of due process rights under the Fourteenth Amendment. Cross-motions for summary judgment were denied and Defendants appealed. Upon interlocutory appeal, the Minnesota Court of Appeals reversed and remanded for consideration of the qualified immunity question under the standard articulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). *McIntire v. State of Minnesota, et al*, 419 N.W. 2d 799 (Minn. App. 1988), *pet for rev. denied*, (Minn. Apr. 20, 1988). The trial court, the Honorable Beryl A. Nord, granted summary judgment on qualified immunity grounds for the individual Defendants and the Minnesota Court of Appeals affirmed. *McIntire v. State of Minnesota, et al*, 458 N.W. 2d 714 (Minn. App. 1990), *pet. for rev. denied*, (Minn. Sept. 28, 1990).

At the motion for summary judgment before the trial court, Marcie McIntire asserted that factual issues in the *Pickering* balancing test were matters for the jury to determine in accordance with *McGee v. South Pemiscot School District R-V*, 712 F. 2d 339 (8th Cir. 1983). These arguments were also asserted at the Minnesota Court of Appeals and in her Petition for Review of the decision of the Minnesota Court of Appeals to the Minnesota Supreme Court. Acknowledging these issues, the Minnesota Court of Appeals opted not to follow existing federal case law as enunciated by the Eighth Circuit Court of Appeals in *McGee*, supra, and other federal appellate courts. See *McIntire v. State of Minnesota, et al*, 458 N.W 2d at 718, n. 3. The federal question was properly raised in the trial court, preserved upon appeal, and is now before this Court on Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted in Order to Have Uniform Application of 42 U.S.C. Section 1983 and the First and Fourteenth Amendments of the United States Constitution for the *Pickering* Balancing Test in State and Federal Courts.

In granting summary judgment against Marcie McIntire on her First Amendment free speech claim, the Minnesota Court of Appeals granted qualified immunity to each of the individual Defendants. *McIntire v. State*, 458 N.W. 2d 714. In doing so, the Court recognized the balancing test adopted in *Pickering v. Board of Education*, 391 U.S. 563 (1968). *McIntire v. State*, 458 N.W. 2d at 717. The Minnesota Court of Appeals utilized a *de novo* approach in application of the *Pickering* balancing test.

First, the Minnesota Court of Appeals determined that the subject matter of Ms. McIntire's memo, breach of public trust, was a matter of public interest. *McIntire v. State*, 458 N.W. 2d at 717. The statements by McIntire addressing unauthorized, possibly fraudulent, expenditures of public funds and discrepancies in financial records charged serious improprieties which were a matter of public concern. *McIntire v. State*, 458 N.W. 2d at 717.

The Supreme Court in *Pickering* did not establish a generalized test, but determined that each case must be evaluated upon its own facts. The Supreme Court in *Pickering*, 391 U.S. 563, noted at page 569:

> Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be sought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.

Ms. McIntire's speech dealt with funding abuses by the SPITHB, the role of the Agency, and the continued

mismanagement of state monies without remedy. Ms. McIntire was concerned about abuse of state money by the SPITHB and violation of the contract between the SPITHB and the Agency. First Amendment decisions in the public employee firing context require application of a three step process. *Lewis v. Harrison School District #1,* 805 F. 2d 310, 313 (8th Cir. 1986) (Lay, C.J.); *cert. denied,* 482 U.S. 905 (1987). The Eighth Circuit Court of Appeals set forth the analysis as follows:

> The first step is to determine whether the speech was "protected" under the Constitution. Under *Connick*, only speech addressing a "matter of public concern" is protected. [Citations omitted]. Even then, *Pickering* instructs the Court to balance "the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." [Citations omitted]. To be protected, speech mush pass both the *Connick* and *Pickering* tests. The second and third steps involve causation. The employee must show that the speech "was a substantial or motivating factor in the adverse employment decision." [Citation omitted]. Finally, the Defendant "may show that the employment action would have been taken even in the absence of the protected conduct." *Lewis,* at 313.

The first question, whether the employee's speech was "protected", is one of law, *Lewis v. Harrison School District #1,* 805 F. 2d at 313. The Minnesota Court of Appeals determined that Ms. McIntire's statements were a matter of public concern. *McIntire v. State,* 458 N.W. 2d at 717.

Next, the Court must perform the so-called "*Pickering* balance". *Lewis v. Harrison School District #1,* 805 F. 2d 310, 315 (8th Cir. 1986); *cert. denied,* 482 U.S. 905 (1987). This requires consideration of the following factors:

1. The need for harmony in the office or work place;
2. Whether the government's responsibilities require a close working relationship to exist between the Plaintiff

and co-workers when the speech in question has caused or could cause the relationship to deteriorate;
3. The time, manner and place of the speech;
4. The context in which the dispute arose;
5. The degree of public interest in the speech;
6. Whether the speech impeded the employee's ability to perform his or her duties.

Lewis v. Harrison School District #1, 805 F. 2d 310, 315 (8th Cir. 1986); *cert. denied*, 482 U.S. 905 (1987); *Bowman v. Pulaski County School District*, 723 F. 2d 640, 644 (8th Cir. 1983); *Connick v. Myers*, 461 U.S. at 149-54; *Roberts v. VanBuren Public Schools*, 773 F. 2d 949, 954 (8th Cir. 1985).

In weighing the above factors, it is for the jury to decide whether the speech created disharmony between the employee and her supervisors in the work place. *McGee v. South Pemiscot School District R-V*, 712 F. 2d 339, 342 (8th Cir. 1983); *Scheider v. City of Atlanta*, 628 F. 2d 915, 919 n. 4. (5th Cir. 1980); See *McIntire v. State*, 458 N.W. 2d at 718, n.3. The balancing of the *Pickering* factors (underlying factual issues) is a jury function. *Lewis v. Harrison School District #1*, 805 F. 2d 310, (8th Cir. 1986); *cert. denied*, 482 U.S. 905 (1987); *Roberts v. VanBuren Public Schools*, 773 F. 2d 949, 954 (8th Cir. 1985). The question of causation, in contrast to the protected speech question, is an issue of fact to be determined by the jury. *Roberts v. VanBuren Public Schools*, 773 F. 2d 949, 954 (8th Cir. 1985); *Wheeler v. Mental Health and Mental Retardation Authority*, 752 F. 2d 1063, 1069 (5th Cir. 1985) *cert. denied*, ___ U.S. ___, 106 S.Ct. 78, 88 L.Ed. 2d 64 (1985). Accord, *Kim v. Coppin State College*, 662 F. 2d 1055 (4th Cir. 1981). A jury must decide the issue of motivation. *Allen v. Scribner*, 812 F. 2d 426, 436 (9th Cir. 1987).

In discussing the rationale for submitting the *Pickering* factors to the jury, the Fourth Circuit Court of Appeals stated in *Kim v. Coppin State College*, supra, at page 1064:

> It is fitting, therefore, for the jury to weigh the factors of disruption of operations, disharmony among co-workers or breach of a confidential working relationship enumerated by the Court in *Pickering*.

These are matters of fact for which the jury is uniquely equipped to filter out self-serving claims and apply its judgment based upon individual experience and an assessment of the credibility of the disputants. See e.g., *McGill v. Board of Education of Pekin Elementary School*, 602 F. 2d 774, 776-77 (7th Cir. 1979).

The ultimate decision, however, is for the Court after the balancing has been completed by the jury. *Lewis v. Harrison School District #1*, 805 F. 2d 310, 315 (8th Cir. 1986); *Roberts v. VanBuren Public Schools*, 773 F. 2d 949, 954 (8th Cir. 1985); See *Kim v. Coppin State College*, 662 F. 2d at 1065. Hence, the jury determines factual issues and the Court makes the ultimate determination whether the First Amendment protects the expression involved after factual findings by the jury. In the instant case, the Minnesota Court of Appeals chose not to follow established federal precedent in its holding and, instead, determined that the question of whether there was office disruption or a need for loyalty and trust could be determined by the Court without submission to a jury. See *McIntire v. State*, 458 N.W. 2d 714, 718 (Minn. App. 1990), n. 3. These issues rely heavily on credibility and truthfulness of witness testimony ordinarily evaluated by a jury. Once the court determines speech is a matter of public concern, the *Pickering* factors must be submitted to the jury. Otherwise, Plaintiffs such as Marcie McIntire will lose their day in state court that is now available in federal court.

In deviating from standards set by federal appellate authority, including the Eighth Circuit Court of Appeals, the Minnesota Court of Appeals determined issues of credibility in favor of individual Defendants without submission to a jury. No evidence was submitted by individual Defendants relative to the effect of Ms. McIntire's statements and the December 4, 1984 memorandum upon other employees or the Agency itself. The state court should not engage in speculation on issues of credibility motivation, and disharmony in the work place on summary judgment. On a motion for summary judgment, all facts must be construed in a light most favorable to the non-

moving party. *Harlow v. Fitgerald*, 457 U.S. 800 (1982). The Minnesota Court of Appeals erred in determining issues ordinarily submitted to the jury in granting qualified immunity for individual Defendants under the standard enumerated in *Lewis v. Harrison School District #1*, 805 F. 2d 310, (8th Cir. 1986); *cert. denied*, 482 U.S. 905 (1987). Once Plaintiff McIntire demonstrated that her speech touched on matters of public concern under *Connick*, 461 U.S. 138, (1983), then the factors enumerated in the *Pickering* balancing test set forth above were to be submitted to the jury. *Lewis v. Harrison School District #1*, 805 F. 2d 310, 315 (8th Cir. 1986); *cert. denied*, 482 U.S. 905 (1987). In the instant case, the Minnesota Court of Appeals recognized that Ms. McIntire's speech on abuse of public funds was a matter of public concern, which satisfied the first step under *Connick*, but erred in failing to submit the remaining factors under the *Pickering* balance to the jury. See *McIntire v. State*, 458 N.W. 2d at 718.

In *Allen v. Scribner*, 812 F. 2d 426, (9th Cir. 1987) the Ninth Circuit Court of Appeals determined that genuine issues of material fact existed to preclude granting of summary judgment against Plaintiff alleging violation of his civil rights under Section 1983 and the First Amendment of the Constitution after finding first that government employees had a clearly established constitutional right to inform the public of significant mismanagement of a public project when no substantial disruption of the project would result. *Allen v. Scribner*, Supra, at 436. Certain factors of the *Pickering* balance were to be decided by the jury. *Allen v. Scribner*, 812 F. 2d at 436. Language by the Ninth Circuit Court of Appeals in *Allen v. Scribner* at page 437 is instructive:

> The resolution of this case will depend to a great extent on the credibility of witnesses with conflicting statements, the motives that can be inferred from the parties' actions, and the relative cumulative weight of the parties' evidence.

The Ninth Circuit further noted in *Allen v. Scribner* at

page 437:

> As the Supreme Court has recently reiterated: "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a Judge." *Anderson*, 106 S.Ct. at 2513.

Similarly, inferences in a light most favorable to Marcie McIntire can be drawn from the evidence. Individual Defendants Michael Haley, James Solem, and Henry Wesley submit no evidence that Marcie McIntire's statements impeded her ability to perform her job or interfered with the Agency's public responsibilities. Ms. McIntire was qualified for her position and sought to draw attention to mismanagement of public funds by the SPITHB. The findings by the state Court of Appeals that her public confrontation with the Agency could only undermine her ability to perform the duties of her job is purely speculation. See *McIntire v. State*, 458 N.W. 2d at 718. Ms. McIntire was able to perform the duties of her job after her statements and December 4 memo, and should not be terminated by the Agency for drawing attention to mismanagement of public funds. Defendants submitted no evidence of Agency problems other than Ms. McIntire's speaking out about the SPITHB.

Certiorari should be granted to uphold the proposition that the right to speak out about breach of public trust without retaliation was clearly established in 1985. The Minnesota Court of Appeals erred in concluding case law had not demonstrated the violated right had been clearly established in 1985. The Court of Appeals referred only to the state court decision of *Finch v. Wemlinger*, 361 N.W. 2d 865 (Minn. 1985), for this holding. See *McIntire v. State*, 458 N.W. 2d at 718. Under existing federal law, Marcie McIntire had a clearly established constitutional right to speak about mismanagment of public funds without retaliation. See *Connick v. Myers*, 461 U.S. 138 (1983); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 273 (1977); *Givhan v. Western Line Consolidated School District*,

439 U.S. 410 (1979). Such speech occupies the "highest rung of the heirarchy of First Amendment values". *NAACP V. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). Misappropriation of public funds represents a matter of compelling public concern. *Atcherson v. Siebenmann*, 605 F. 2d 1058, 1063 (8th Cir. 1979).

The First Amendment protects parties in the free publication of matters of public concern and secures their right to a free discussion of public events and public measures. *Wood v. Georgia*, 370 U.S. 375 (1962). The First Amendment enables every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of that authority. *Wood v. Georgia*, 370 U.S. at 392. The granting of a summary judgment against a non-tenured state [employee] without a full exploration of the [employee's] claim that his . . . contract was not renewed on the constitutionally impermissible basis of reprisal because of the [employee's] exercise of constitutionality protected rights, including the right to free speech, is improper. *Perry v. Sindermann*, 408 U.S. 593 (1972). The right to speak out on matters of public concern involving breach of public trust was clearly established in 1985 at the time of Marcie McIntire's discharge from the Minnesota Housing Finance Agency. Plaintiff asks the Supreme Court to grant Certiorari to correct the interpretation of the state court based solely on state law.

The Minnesota Court of Appeals' ruling conflicts with existing precedent in the federal circuit Courts of Appeals that require the *Pickering* balancing factors to be submitted to the jury rather than for the Court to determine. See *McGee v. South Pemiscot School District R-V*, 712 F. 2d 339 (8th Cir. 1983); *Lewis v. Harrison School District #1*, 805 F. 2d 310 (8th Cir. 1986); *cert. denied* 482 U.S. 905 (1987); *Kim v. Coppin State College*, 662 F. 2d 1056 (4th Cir. 1981); *Allen v. Scribner*, 812 F. 2d 426 (9th Cir. 1987); see also *Greenberg v. Kmetko*, 840 F. 2d 467 (7th Cir. 1988) (en banc).

The conflict with existing federal court appellate precedent necessitates review by the United States Supreme Court.

The state court opted against following federal precedent in determining that the *Pickering* factors need not be submitted to the jury. See *McIntire v. State*, 458 N.W. 2d at 718. Certiorari should be granted when a State Court opinion on a federal question is in conflict with decisions of federal Courts of Appeals. *Missouri Pacific Railroad Co. v. Elmore and Stahl*, 377 U.S. 134 (1964). The Supreme Court should grant certiorari when confronted with an important question of federal statutory construction and an alleged conflict between federal courts and state courts of final jurisdiction. *United States v. Oregon*, 366 U.S. 643 (1961); see *Murray v. Joe Gerrick and Co.*, 291 U.S. 315 (1934) (federal statute misconstrued by state court). The Supreme Court of the United States has jurisdiction of a case in which the decision of a state court was against a right claimed under a statute of the United States. *Buel v. Van-Ness*, 21 U.S. 312, 8 Wheat 312 (1823). In the instant case, Plaintiff asserts a claimed violation of 42 U.S.C. Section 1983 and rights secured by the First Amendment to the United States Constitution as well as the Fourteenth Amendment. This Court has jurisdiction over the claims brought under federal constitutional and statutory provisions and should grant Certiorari to review the decision of the Minnesota Court of Appeals in conflict with existing federal caselaw. In particular, the Minnesota Court of Appeals decision conflicts with existing precendential case law with the Eighth Circuit of Appeals. See *McGee v. South Pemiscot School District R-V*, 712 F. 2d 339 (8th Cir. 1985); *Lewis v. Harrison School District #1*, 805 F. 2d 310, (8th Cir. 1986); *cert. denied*, 42 U.S. 905 (1987). Individuals should not encounter a different interpretation of 42 U.S.C. Section 1983 and the First and Fourteenth Amendments of the United States Constitution in state courts than in federal courts. Certiorari should be granted in this case to protect equality in interpreting these federal laws in state and federal courts.

The submission of the *Pickering* balance factors to the jury has not been decided by the United States Supreme Court and a decision to settle this issue will guide both state

and federal Courts. This important decision will affect all cases involving claims for violations of First Amendment rights under 42 U.S.C. Section 1983 involving the *Pickering* balance. While each case may differ factually, the steps for applying *Pickering* should be the same in state and federal court. In the present case, the process for application of the *Pickering* balance is different in Minnesota state courts than in federal courts under existing case law discussed above. Public employees should not face different standards under the *Pickering* balancing test because of their choice of forum, whether it be state or federal court. Accordingly, this Court should grant Certiorari to resolve the conflict that exists.

II. Certioari Should Be Granted to Preserve Due Process Rights of Probationary Public Employees Deprived of Employment Opportunities Because of Their Speech.

Certiorari should be granted to safeguard due process rights of probationary public employees to employment and opportunity for continued employment without discharge because of their speech. Probationary public employees will face extreme prejudice if the state can 1) terminate employment for speech that is not subject to a jury's evaluation on the *Pickering* balancing factors; and 2) simultaneously avoid procedural safeguards afforded to certified employees.

The Court of Appeals held that Ms. McIntire failed to demonstrate a protectible property interest in continued employment while on probationary status. *McIntire v. State,* 458 N.W. 2d at 718. Although Plaintiff was a probationary employee at the time of her discharge, lack of a contractural or tenure right to employment does not defeat a claim that the non-renewal of such employment violates one's rights under the First and Fourteenth Amendment. *Perry v. Sindermann,* 408 U.S. 593, 596 (1972). The government may not deny a benefit to a person on a basis that infringes his constitutionally protected interest — especially his interest in freedom of speech. *Perry v. Sindermann,* 408 U.S at 597. Marcie McIntire was

discharged from her position as Indian Housing Cooridinator because of her speech and statements made in her December 4, 1984 memorandum. Indeed, her probationary status was extended in January, 1985 for an additional ninety days to retain her probationary status. Because of her continued probationary status, Marcie McIntire was not entitled to certain arbitration and procedural benefits available under the collective bargaining agreement. To be deprived not only of present government employment but of future opportunities for it is no small injury. *Board of Regents v. Roth*, 408 U.S. 564, 574 (1972). A state, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities in a manner than contravenes due process. *Board of Regents v. Roth*, 408 U.S. at 574. Ms. McIntire would have received arbitration rights as well as certification as a permanent employee but for Defendants' non-certification in January, 1985 and subsequent termination in retalitation for her speech. Public employees are not required to be certified to retain due process rights to employment when termination is based upon protected speech. *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1962).

Certiorari should be granted in order to preserve the above claims for deprivation of due process in state court proceedings when they hinge upon free speech rights dismissed by the state court without submitting *Pickering* factors to the jury. When interests as significant as one's employment and livelihood are at stake, state courts must apply federal free speech standards for qualified immunity. In this case, the state Court of Appeals strayed from existing federal precedent on the *Pickering* balance that not only affected Plaintiff's First Amendment claim but also her Fourteenth Amendment due process claim. A decision by the Supreme Court to set a clear course that state and federal courts must take in *Pickering* qualified immunity cases is necessary.

CONCLUSION

For all of the above reasons, Petitioner Marcie McIntire respectfully requests that the Supreme Court grant her Petition for Writ of Certiorari.

Respectfully Submitted,

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Marcie McINTIRE, Appellant.

v.

The STATE of Minnesota, Minnesota Housing Finance Agency, James Solem, Individually and in his Official Capacities as its Executive Director; Henry Wesley, Individually and in his Official Capacities as Director of Home Mortgage Program, Respondents.

No. C6-89-2265

Court of Appeals of Minnesota

Aug. 7, 1990

Review Denied Sept. 28, 1990.

Dishcarged probationary state agency employee brought action against agency personnel. On remand, 419 N.W.2d 799, the District Court, Hennepin County, Beryl A. Nord, J., granted summary judgment for defendants, and appeal was taken. The Court of Appeals, Lansing J., held that (1) agency personnel had qualified immunity from § 1983 liability; (2) employee was not deprived of due process or liberty interest; and (3) agency personnel did not defame employee by placing reason for discharge in her personnel file.

Affirmed.

1. Appeal and Error 762

Errors not raised in appeal brief were waived and could not be revived by addressing them in reply brief.

2. Constitutional Law 90.1(7.2)

Public employee's memorandum addressing unauthorized, possibly fraudulent, expenditures of public funds and discrepencies in financial records, irrespective of accuracy of statements, constituted matter or public interest subject to First Amendment protection. U.S.C.A. Const.Amend. 1.

3. Civil Rights 214(1)
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Supervisors did not violate clearly established First Amendment rights of agency's spokesperson by discharging her for issuing memorandum giving her version of issues raised in legislative auditor's report, and thus were entitled to qualified immunity from § 1983 liability to spokesperson. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

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6. Civil Rights 144
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7. Civil Rights 118
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9. Libel and Slander 39
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placement of reasons for employee's discharge in her personnel file, in that heads were required by law to disclose reasons for discharge. M.S.A. §§ 43A.33, subd. 3, 268.10, subd. 1, 363.06, subd. 1.

10. Labor Relations 777

State agency did not breach collective bargaining agreement with terminated employee absent evidence that grievance procedures contemplated by agreement were not provided.

11. States 53

Discharge of probationry state agency employee, allegedly for insubordination and misconduct, did not contravene clear mandate of public policy.

Syllabus by the Court

1. In action seeking damages for alleged violation of free speech rights under 42 U.S.C. § 1983, the trial court correctly determined that agency's executive director, personnel director, and supervisor had a qualified immunity from liability for conduct which did not violate clearly established constitutional rights.

2. Claims alleging liberty and due process violations under 42 U.S.C. § 1983 were properly dismissed because claimant failed to show a protectible property interest in continued employment or a violation of liberty interest that could withstand summary judgment.

3. Absence of evidence of discrimination forecloses federal and state discrimination claims.

4. On the remaining state law claims of wrongful discharge, defamation and breach of contract, trial court properly granted summary judgment as a matter of law.

Stephen C. Fiebiger, Minneapolis, for appellant.

Hubert H. Humphrey, III, Atty. Gen., Sara H. Jones, Sp. Asst. Atty. Gen., St. Paul, for respondents.

Considered and decided by LANSING, P.J., and SCHUMACHER and SHORT, JJ.

OPINION

LANSING, Judge.

Marcie McIntire seeks damages under 42 U.S.C. § for alleged violations of her civil rights and liberties and for various state law claims arising from discharge from her employment with the Minnesota Housing Finance Agency. Three of the defendants, all government officials, unsuccessfully moved for summary judgment claiming a qualified immunity from liability on the free speech allegations. On appeal from the denial of their motion we reversed and remanded, directing the trial court to reconsider its decision in light of *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). *See McIntire v. State*, 419 N.W.2d 799 (Minn.App.1988), *pet. for rev. denied*, (Minn. Apr. 20, 1988) (*"McIntire I"*).

On remand, the trial court in two successive rulings granted summary judgment against McIntire on all claims. McIntire now appeals the adverse judgment on the alleged violations of free speech, liberty, and due process and on her claims of discrimination, defamation, breach of contract and wrongful discharge.

FACTS

Marcie McIntire was employed from July 1984 to February, 1985, as the Indian Housing Coordinator for the home mortgage division of the Minnesota Housing Finance Agency. Her duties included overseeing the administration of funds to several Indian housing programs and working with the administrators of those programs and the Indian communities which they serve. McIntire's supervisor, Michael Haley, had ultimate responsibility for approving program budgets.

Prior to McIntire's hiring, the agency had begun an investigation of one of the programs, the St. Paul Intertribal Housing Board. When McIntire was hired she was informed of the reports that the board had misused agency funds by

making unauthorized loans and salary increases and that measures were underway to correct any misappropriations.

Two months into the position McIntire made several public statements which her supervisors viewed as inappropriate. At a tribal meeting she indicated that the state auditor had a conflict of interest in auditing one of the Indian programs. At a public meeting with the Urban Indian Advisory Council, McIntire implied that board members were sophisticated embezzlers. McIntire also contradicted her supervisor at a Housing Finance Agency board meeting.

Six months after McIntire was hired, Haley intercepted an outgoing envelope addressed to "Senate Council" and discovered a nine-page memorandum addressed to him from McIntire. Although the memorandum was dated three days earlier, Haley had not seen it. The memo outlined in detail how expenditures by the board had exceeded their approval budget and stated that McIntire opposed continued funding to the board.

Haley directed McIntire not to distribute the memo. Despite Haley's order and without informing him of her action, McIntire mailed copies of the memo to six individuals outside the agency, including a union representative and members of the Indian community.

Because of McIntire's public statements, but without knowledge of her distributing the memo, the agency witheld certification of McIntire's permanent employment and extended her probationary period. The agency notified McIntire by written memorandum how her conduct should be corrected in order to gain permanent employment.

Haley received calls from members of the Indian community who told him that McIntire's memo had been "widely distributed." The agency concluded that McIntire's actions were insubordinate and that the working relationship had completely broken down and terminated McIntire's employment.

After exhausting grievance procedures under her collective bargaining agreement, McIntire brought this action against the State of Minnesota, the Housing Finance

Agency, agency executive director James Solem, agency personnel director Henry Wesley and Haley.[1]

ISSUES

1. Does the qualified immunity doctrine apply to the conduct of individual government officials?

2. Was McIntire deprived of property or liberty without due process of law in violation of the fourteenth amendment?

3. Is there any evidence to support the claims of discrimination?

4. Are there material issues of fact on the remaining state law claims of defamation, breach of contract and discharge in violation of public policy?

ANALYSIS

I.

First Amendment Claims

[1] The Federal standard of qualified immunity applies in actions under 42 U.S.C. § 1983 brought in Minnesota courts. *Finch v. Wemlinger*, 310 N.W.2d 66, 70 (Minn.1981). Under this doctrine, government officials are not liable for civil damages if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. at 818, 102 S.Ct. at 2738. McIntire contends that Solem, Wesley and Haley violated her clearly established first amendment rights when McIntire was discharged in 1985.[2] This is a question of law, although it obviously turns on factual predicates. *McIntire I*, 419 N.W.2d at 802.

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[1] These facts are largely taken from *McIntire I*, 419 N.W.2d at 800-801.

[2] In her appeal brief, McIntire did not raise or argue her free speech and due process claims against the State of Minnesota and the Housing Finance Agency. Although these claims appear unfounded (*see Will v. Michigan Dept. of State Police*, ____ U.S. ____, ____, 109 S.Ct. 2304, 2312, 105 L.Ed.2d 45 (1989), holding eleventh amendment bars § 1983 action against a state and its departments), they have been waived and cannot be revived by addressing them in the reply brief. *See Balder v. Haley*, 399 N.W.2d 77, 80 (Minn.1987), Minn.R.Civ.App.P. 12802, subd. 3 (1990).

More than twenty years ago, the Supreme Court ruled that public employees do not abandon their constitutionally protected freedom of speech when they enter the work place. *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). Countering this right, the Court recognized that public employers would lose their ability to function effectively if they could not control employee expression to some degree. To mediate these competing rights *Pickering* requires the use of a balancing test. *Id.*

The threshold question on the employee's side of the balance is whether the employee's statements may be "fairly characterized as constituting speech on a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 2897, 97 L.Ed.2d 315 (1987) (citing *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1689, 75 L.Ed.2d 708 (1983)). This analysis includes an examination of the content, form and context of the statements. *Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690.

[2] McIntire's memorandum addressed the unauthorized, possibly fraudulent, expenditures of public funds and discrepancies in financial records. Irrespective of the accuracy of the statements, the subject matter, breach of public trust, is a matter of public interest. *See Roth v. Veteran's Administration*, 856 F.2d 1401, 1406 (9th Cir.1988); *Czurlanis v. Albanese*, 721 F.2d 98, 104 (3d Cir.1983). That a legislative audit raising similar concerns was issued just prior to the distribution of McIntire's memo substantiates the public interest.

We do not overlook that McIntire has a personal stake in drafting the memo and that this motivation detracts from the first amendment implications. *See Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690. McIntire had confided to a union official her fears of being held liable for the funding abuses. The official advised her to write a memorandum detailing her disagreements with the agency's position. Although motivation behind a statement may affect the ultimate balance, subject matter is the predominant factor in this

threshold analysis. *Yoggerst v. Hedges*, 739 F.2d 293, 296 (7th Cir.1984). McIntire's statements charged serious improprieties which were a matter of public concern.

Having determined that the employee's speech is of public concern, we turn to the employer's side of the fulcrum. In determining the state's interest, we must consider:

> (1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or could cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.

Lewis v. Harrison School District No. 1, 805 F.2d 310, 315 (8th Cir.1986); *cert. denied*, 482 U.S. 905, 107 S.Ct. 2481, 96 L.Ed.2d 374 (1987).

We note initially that McIntire's position in the agency was one of high profile. She was an agency spokesperson. Employees with this type of responsibility carry a corresponding duty of caution with respect to the words that they speak. *Rankin*, 107 S.Ct. at 2900. McIntire's public confrontation with the agency could only undermine her ability to perform the duties of her job, especially when one considers the harsh tone of her memorandum. *See Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1258 (7th Cir.1985) (county liason's ability to represent her employer was hindered by inappropriate statements.)

We also consider that the issues raised in McIntire's memo had already been the subject of a legislative auditor's report. The alleged improprieties had not been concealed from public knowledge. Finally, McIntire's memo pre-empted the agency's opportunity to respond to the auditor's report. This was clearly contrary to the agency's interests.

and consistent only with McIntire's personal stake in the matter.[3]

Having identified the interests of the individual and the state, the *Pickering* test requires us to balance McIntire's interest, as a citizen, speaking out on a matter of public concern, against the interest of the agency, as employer, in furthering the agency's work. *See Rankin*, 107 S.Ct. at 2898; *Connick*, 461 U.S. at 149-51, 103 S.Ct. at 1691-92.

[3] Balancing these interests in the context of qualified immunity moves the fulcrum on which the decision turns. To penetrate the government officials' qualified immunity, the balance must be in favor of the employee to a degree that evidences a clearly established right. The unlawfulness of the act must be apparent in the light of pre-existing law. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).

Courts usually ascertain whether the claimed violated right has been clearly established by comparing the facts of the case under consideration with other decided case facts. *Johnson v. Morris*, 453 N.W.2d at 39. The Minnesota Supreme Court made this comparison in *Finch v. Wemlinger*, 361 N.W.2d 865, 870-71 (Minn.1985). The court weighed that balance in favor of the immunity of government officials who had discharged an employee for informing certain state senators that hiring practices in his agency were politically motivated. The court observed that the holding of *Pickering* did not create a standard that the officials would have known they violated in their treatment of Finch. *Id.*

Although McIntire was discharged eight years after the

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[3]Ordinarily, the question of whether there is office disruption or a need for loyalty and trust is a jury matter. *McGee v. South Pemiscot School District R-V*, 712 F.2d 339, 342 (8th Cir. 1983). Here, however, the facts peculiar to this case are sufficiently uncontroverted so that jury findings are unnecessary in the context of an immunity determination. *See McIntire I*. The objective qualified immunity standard adopted in *Harlow* militates in favor of resolving immunity issues without trial if possible. *See Harlow*, 457 U.S. at 816-817, 102 S.Ct. at 2737; *Johnson v. Morris*, 453 N.W.2d 31, 40 (Minn.1990).

discharge in *Finch*, intervening case law has not established a clear standard which the officials in this case transgressed in terminating McIntire's employment. On these facts the individual respondents did not violate clearly established first amendment rights by discharging McIntire.

II.

Procedural Due Process

[4] To be cognizable, McIntire's due process rights must be based on a protectible property interest in continued employment. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). McIntire was a probationary employee. Although probationary status does not insulate the agency from liability for free speech violations, absent such a violation McIntire must demonstrate an independent property interest in continued employment to survive dismissal on her due process action. There is no evidence in the record that any rules or understandings conferred to McIntire a right to continued employment. *See Id.*

[5] McIntire has likewise failed to show a deprivation of any liberty interest. In *Roth*, the Supreme Court ruled that the dismissal of a government employee accompanied by a "charge against him that might seriously damage his standing and associations in his community" triggers the due process right to a hearing at which the employee can publicly clear his or her name." *Id.* at 573, 92 S.Ct. at 2707. The Supreme Court later amplified its ruling, holding that if the charges are not made public, they cannot form the basis for a claim that the employee's good name or reputation was impaired. *Bishop v. Wood*, 426 U.S. 341, 348, 96 S.Ct. 2074, 2079, 48 L.Ed.2d 684 (1976).

McIntire was discharged for "willful misconduct." The agency did not inform prospective employers or the community at large of the reason for McIntire's dismissal. McIntire has not demonstrated that any employment opportunities have been foreclosed by the agency action. No liberty interest is implicated.

III.

Discrimination

[6] McIntire alleges that she was discharged because of her race as an American Indian, contrary to 42 U.S.C. § 1981 and the Minnesota Human Rights Act, Minn.Stat. § 363.03, subd. 1(2) (1984).[4] In order to survive a summary judgment motion, McIntire must establish a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973); *Danz v. Jones*, 263 N.W.2d 395, 399 (Minn. 1978). A prima facie case may be established by direct evidence of discrimination or by a demonstration that:

> (1) [the employee] is a member of a protected class; (2) [the employee] was qualified for the job from which he was discharged; (3) [the employee] was discharged, and (4) the employer assigned a nonmember of the protected class to do the same work.

Hubbard v. United Press International, Inc., 330 N.W.2d 428, 442 (Minn.1983).

McIntire did not submit any direct evidence of discrimination and her claims do not satisfy the four-part *Hubbard* test. The last element in the *Hubbard* test is clearly lacking as it is undisputed that McIntire was replaced by an American Indian. Because of her failure to establish a prima facie case, summary judgment on this cause of action was properly granted.

[7] McIntire also claims that the conditions of her employment were discriminatory. Her bald charges of race discrimination in working conditions are inadequate as a matter of law to survive a summary judgment motion. These claims are also foreclosed because § 1981 prohibits discrimination only in the making and enforcement of contracts. It does not reach discriminatory working conditions. *Patterson v. McLean Credit Union*, ___ U.S. ___, ___, 109 S.Ct. 2363, 2373, 105 L.Ed.2d 132 (1989).

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[4] We assume, for purposes of this analysis, that a racially discriminatory discharge is actionable under Section 1981. *See Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir.1990).

IV.

Defamation

When respondents fired McIntire, they informed the Department of Economic Security, the Human Rights Department, and a union representative that McIntire was terminated for "willful misconduct." Also, a statement explaining the reason for McIntire's discharge was placed in the agency's personnel file. McIntire claims that these communications defamed her character.[5]

[8,9] Under Minnesota law, a party may be held liable for defamation when (1) a false statement (2) is communicated to a third person (3) which tends to harm the plaintiff's reputation or lower the plaintiff in the estimation of the community. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn.1980). Respondents do not dispute, for the purposes of this appeal, the last two elements. They contend, however, that McIntire's actons were willful misconduct and, in any event, an absolute and qualified privilege shields them from liability.

In Minnesota, truth as a defense goes to the underlying implication of the statement, not to the statement's verbal accuracy. *Lewis*, 389 N.W.2d at 889. It cannot be disputed that McIntire knew she was disobeying her employer's orders. Whether this was willful misconduct in the large sense may be a question of fact.

Even if McIntire could prevail on this element, liability does not attach if the statement is privileged. We have previously ruled that under state law public bodies and public officials have an absolute privilege to follow the requirements of the law. *Freier v. Independent School District No. 197, 356 N.W.2d 724, 729 (Minn.App.1984) (quoting Restatement (2d) of Torts, Section 592A (1977)); see Grossman v. School Board of I.S.D. No. 640*, 389 N.W.2d 532, 536 (Minn.App.1986). Respondents were required by law to disclose the reasons for McIntire's discharge to the

[5]McIntire admits that she was not compelled to disclose respondents' statements to any prospective employer. See *Lewis v. Equitable Life Assurance Society of the United States*, 389 N.W.2d 876, 888 (Minn.1986).

Department of Employee Relations, the Department of Economic Security, and the Human Rights Department. *See* Minn.Stat. §§ 43A.33, subd. 3; 268.10, subd. 1; and 363.06, subd. 1. With respect to these publications, the respondents enjoy an absolute privilege and are immune to suit.

Whether respondents were permitted to place a statement explaining the reasons for McIntire's discharge in the agency's personnel file entails a qualified privilege. *Frankson v. Design Space International*, 394 N.W.2d 140, 144 (Minn.1986). When there is a qualified privilege, there can be no recovery for defamation absent evidence of actual malice. *Lewis*, 389 N.W.2d at 889.

McIntire has failed to demonstrate actual malice. There is no extrinsic evidence indicating ill will between the parties, nor is there intrinsic evidence, such as exaggerated language, which might suggest an intent to injure McIntire. *See Frankson*, 394 N.W.2d at 144. The trial court correctly ordered summary judgment on McIntire's defamation claims on the ground of qualified privilege.

V.

Breach of Contract

[10] McIntire asserts the violation of several rights under her collective bargaining agreement, including the right to (i) an appropriate job description, (ii) periodic job performance evaluations, and (iii) union representation during questioning. We find no merit in McIntire's position. Nothing in the record indicates that McIntire's bargaining agreement contemplated avenues of relief outside the grievance process. The grievance process provided McIntire with the right to have the union meet with the agency in an attempt to resolve her grievance. Within 10 days, the agency was required to decide whether her grievance was meritorious. No further process was provided, and it is evident from the procedural scheme set forth in the agreement that the agency decision was intended to be the exclusive procedure for consideration of the grievance. *See Bowen v. United States Postal Service*, 459 U.S. 212, 225 n.

14, 103 S.Ct. 588, 596, n. 14, 74 L.Ed.2d 402 (1983); *Vaca v. Sipes,* 386 U.S. 171, 184 n. 9, 87 S.Ct. 903, 913 n. 9, 17 L.Ed.2d 842 (1967); *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 657-658, 85 S.Ct. 614, 618-619, 13 L.Ed.2d 580 (1965).

VI.

Wrongful Discharge

[11] Finally, McIntire argues that she was discharged in violation of the public policy exception to at-will employment. In *Phipps v. Clark Oil and Refining Corp.*, 396 N.W.2d 588 (Minn.App.1987), *aff'd.*, 408 N.W.2d 569 (Minn.1987), an at-will employee refused to dispense leaded gasoline into an automobile equipped to receive only unleaded gasoline, correctly believing that such an act would be in violation of the law. After being terminated for this conduct, the employee brought suit for wrongful discharge. On appeal, this court ruled that an employer may not discharge an employee for reasons that "contravene a clear mandate of public policy." *Id.* at 592.

Applying *Phipps,* we do not believe the reasons for McIntire's discharge contravened a clear mandate of public policy. Unlike *Phipps*, McIntire was not asked to violate the law. Moreover, McIntire's discharge did not violate any clearly established statutory or constitutional rights. The "whistleblower" statute, Minn.Stat. § 181.932, had not yet been enacted. Accordingly, the trial court correctly dismissed this claim.

DECISION

The trial court properly granted summary judgment on McIntire's claims relating to free speech, procedural due process, discrimination, defamation, breach of conduct and wrongful discharge.

Affirmed.

Marcie McINTIRE, Respondent,

v.

The STATE of Minnesota, et al., Appellants.

No. C7-87-1556.

Court of Appeals of Minnesota.

Feb. 23, 1988.
Review Denied April 20, 1988.

Fired public employee brought suit alleging that her First Amendment free speech rights were violated. The District Court, Hennepin County, Patrick Fitzgerald, J., denied three government officials' motion for summary judgment, and they appealed. The Court of Appeals, Parker, J., held that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which reasonable person would have known.

Reversed and remanded.

1. Appeal and Error 95

Court of Appeals has jurisdiction to review order denying motion to dismiss government official from lawsuit when basis of motion is immunity from suit.

2. Officers and Public Employees 114

Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which reasonable person would have known.

3. Constitutional Law 90.1(7.2)

When state employee claims violation of her First Amendment free speech rights, trial court must balance interest of employee, as a citizen, in commenting on matter of public concern and interests of State, as employer, in promoting efficiency of public services it provides through its employees. U.S.C.A. Const.Amend. 1.

4. Constitutional Law 90.1(7.2)

In public employee firing context, test to determine whether employee's speech is protected is whether it addresses matter of public concern and whether State's interests outweigh employee's interest. U.S.C.A. Const.Amend. 1.

Syllabus by the Court

Trial court erred by failing to analyze claim of qualified immunity under the objective standard established by *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

Stephen C. Fiebiger, Fiebiger & Flaim, Minneapolis, for respondent.

Hubert H. Humprhey, III, Atty. Gen., Jean Boler, Mark Levinger, Sp. Asst. Attys. Gen., St. Paul, for appellants.

Heard, considered and decided by WOZNIAK, C.J., and PARKER and SCHUMACHER, JJ.

OPINION

PARKER, Judge.

[1] Appellants, three government officials, seek review of an order denying their motion for summary judgment. They claim the trial court should have held that they have qualified immunity from suit on respondent's first amendment claims. This court has jurisdiction to review an order denying a motion to dismiss a governmental official from a lawsuit when the basis of the motion is immunity from suit. *See Anderson v. City of Hopkins*, 393 N.W.2d 363, 363-64 (Minn. 1986). We reverse and remand.

FACTS

In July 1984 appellant Minnesota Housing Finance Agency hired respondent Marcie McIntire, an American Indian, as the Indian Housing Coordinator for its home mortgage division. Her duties were to oversee the administration of funds to several Indian housing programs and to act as the agency's representative to the administrators of those programs and the Indian

communities they serve. One such program was the St. Paul Intertribal Housing Board (board). McIntire's supervisor, appellant Michael Haley, had ultimate responsibility for approving program budgets, including the board's budget.

In the spring of 1984, before McIntire was hired, the agency investigated reports that the board had been misusing agency funds through unauthorized loans and salary increases. When McIntire was hired in July, she was informed of these problems and that measures were being taken to correct them.

In August and September 1984 McIntire made several public statements which her supervisors viewed as inappropriate. At a tribal meeting she indicated that the state auditor had a conflict of interest in auditing one of the Indian programs. At a public meeting with the Urban Indian Advisory Council McIntire implied that board members were sophisticated embezzlers. McIntire also contradicted her supervisor at a Housing Finance Agency Board meeting.

On December 7, 1984, Haley, the director of the agency's home mortgage program, opened an outgoing envelope addressed to "Senate Council." In it was a nine-page memorandum addressed to Haley from McIntire. The memo was dated December 4, 1984, but Haley had not previously seen it. The memo outlined in detail how expenditures by the board had exceeded their approved budget and stated that McIntire opposed continued funding to the board.

Upon reading the memo, Haley directed McIntire not to distribute the memo. Despite his order and without informing Haley of her action, McIntire mailed copies of the memo to six individuals outside the agency, including a union representative and members of the Indian community.

Because of McIntire's public statements, but without knowledge that she had mailed the December 4 memo, the agency decided to extend McIntire's probationary period rather than certify her for permanent employment. By memoranda dated January 10 and 14, 1985, the agency notified McIntire how her conduct should be corrected in

order for her to be certified for permanent employment.

Haley received calls from members of the Indian community in January 1985 who told him that McIntire's December 4 memo had been "widely distributed" in the Indian community. The agency determined that McIntire had been insubordinate and that the working relationship had completely broken down. On February 15, 1985, McIntire was discharged from the agency.

McIntire sued the State of Minnesota, the Housing Finance Agency, agency executive director James Solem, agency personnel director Henry Wesley, and Haley. Solem, Wesley and Haley moved the trial court for summary judgment dismissing McIntire's suit. The trial court denied the motion without specifically addressing the claims of qualified immunity, reasoning that there were "a myriad of unresolved questions surrounding [McIntire's] employment and dismissal."

ISSUE

Did the trial court err in failing to apply an objective standard to appellants' claim of qualified immunity pursuant to *Harlow v. Fitzgerald*?

DISCUSSION

[2] Under the standard set forth in *Harlow v. Fitzgerald*, government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constututional rights of which a reasonable person would have known.

Id., 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

> The rationale of the defense is that public officials with a broad range of duties and responsibilities must be able to execute those responsibilities without undue risk of civil liability.

Finch v. Wemlinger, 361 N.W.2d 865, 868 (Minn.1985).

In *Harlow* the Supreme Court further explained the applicable test:

> If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense would turn primarily on objective factors.

Harlow, 457 U.S. at 818-19, 102 S.Ct. at 2738. Whether the law was clearly established is a threshold question; if the trial court finds the law was not clearly established when the conduct occured, "the inquiry ceases" and "the official is entitled to summary judgment as a matter of law." *Finch*, 361 N.W.2d at 868.

> The scope of the qualified immunity doctrine is broad: As the qualified immunity defense has evolved, it provides ample protection to all but the plainly imcompetent or those who knowingly violate the law.

Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986).

[3] Because McIntire claims that appellants violated her first amendment free speech rights, the trial court must balance

> the interests of the [employee], as a citizen, in commenting on matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

See Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968). The trial court must carefully consider the facts surrounding McIntire's claimed right to free speech in this case. McIntire did not use internal communication channels to relate a perceived problem, but instead attempted to distribute a memo addressed to her supervisor without first showing it to him. After her supervisor specifically directed that she not distribute the memo, McIntire defied his order, publicly distributed it and concealed her distribution of it.

[4] McIntire essentially claims that she had a "clearly established" constitutional right to violate her supervisor's specific order and distribute an intra-agency memo addressed but not sent to him. In a public employee firing context, the test to determine whether an employee's speech is protected is (1) whether it addresses a matter of public concern, and (2) whether the state's interests articulated in *Pickering* outweigh the employee's interests. *See Lewis v. Harrison School District 1*, 805 F.2d 310, 313 (8th Cir.1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 2481, 96 L.Ed.2d 374 (1987). The following facts must be considered in applying this test: the information contained in the memo had previously been brought to the attention of the legislative auditor who was conducting detailed audits of the board; several days *before* distribution of the memo, the legislative auditor issued its report on the board, confirming funding abuses; and the Housing Finance Agency cut off the board's funding *before* McIntire distributed her memo.

The trial court should balance the interest of the agency, in promoting the efficiency of the public services it performs through its employees, against any right McIntire may have had to take action in the specific factual setting here. Factors bearing on the smooth operation of the workplace — such as the maintenance of discipline by immediate supervisors, harmony among co-workers, and the existence of a close working relationship between supervisor and subordinate calling for trust, confidence and loyalty — should be considered. *See Finch*, 361 N.W.2d at 870. The "exact parameters of the free speech rights of public employee" must also be clearly established. *See id.* at 871.

The trial court found the issues here were "not appropriately resolved by summary judgment motion." We have stated, however, that a determination of whether an official's conduct falls within the scope of the immunity outlined by the objective *Harlow* test is "generally a question of law which may be resolved by summary judgment." *Anderson v. City of Hopkins*, 400 N.W.2d 350, 354 (Minn.Ct.App.1987).

Failure to apply the *Harlow* standard requires a remand

for proper consideration of it. *Id.* at 355. The trial court denied appellants' claim of immunity and made no reference to the *Harlow* standard in its analysis. Because the trial court is "more familiar with the record and is better situated to make any necessary findings," it must apply the *Harlow* standard before this court can review the decision. *See id.*

DECISION

We reverse and remand this case to the trial court for application of the objective *Harlow* test in analyzing appellants' claim of qualified immunity.

Reversed and remanded.

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Marcie McIntire,

Plaintiff,

vs.

The State of Minnesota,
Minnesota Housing Finance Agency, James Solem,
Individually and in his Official Capacities
as its Executive Director;
Henry Wesley, Individually and in Official Capacities
as its Personnel Director; and Michael Haley,
Individually and in his Official Capacities as
Director of Home Mortgage Program,

Defendants.

ORDER AND MEMORANDUM

File No. MC 85-19993

The above-entitled matter came on for hearing before the undersigned Judge of District Court pursuant to defendants' motion for partial summary judgment encompassing Counts I through V of the complaint.

Stephen C. Fiebiger, Esq., appeared on behalf of plaintiff and Kevin Staunton, Esq., and Scott Strand, Esq., appeared on behalf of defendants.

Based upon the files, records and proceedings held herein, the court makes the following:

ORDER

1) That defendants' motion for summary judgment with respect to Count I of plaintiff's complaint alleging discrimination contrary to Minn. Stat. § 363.01 *et seq.* be **GRANTED.**

2) That defendants Wesley, Solem and Haley's motion for summary judgment with respect to Count II of plaintiff's complaint alleging free speech violations under 42 U.S.C. § 1983 be **GRANTED.**

3) That defendants Wesley, Solem and Haley's motion for summary judgment with respect to Count III of plaintiff's complaint alleging liberty and due process violations under 42 U.S.C. § 1983 be **GRANTED.**

4) That defendants' motion for summary judgment with respect to Counts IV and V of plaintiff's complaint alleging discrimination contrary to 42 U.S.C. §§ 1981 and 1985(3) respectively, be **GRANTED.**

5) That the attached memorandum be incorporated herein by reference.

LET JUDGMENT BE ENTERED ACCORDINGLY,
BY THE COURT:

Beryl A. Nord
Judge of District Court

Dated: this 25th Day of January, 1989.

MEMORANDUM

The matters before this court stem from plaintiff Marcie McIntire's discharge from employment on February 15, 1985. On July 2, 1984, plaintiff, a female American Indian, was hired as the Indian Housing Coordinator for the Minnesota Housing Finance Agency (Agency). The duties of the Indian Housing Coordinator were to oversee the day to day administration of Agency funds to the several urban and outstate Indian housing programs and to act as the Agency's representative to the administrators of these programs and the Indian communities they served. Plaintiff was hired as a probationary employee under state law and the collective bargaining agreement between the State and the Minnesota Association of Professional Employees (MAPE).

One of the ongoing issues at the Agency at the time plaintiff was hired was its relationship with one of the Indian housing programs run by the St. Paul Intertribal Housing Board (SPIHB). In the spring of 1984 the Agency had investigated reports that the SPIHB had been misusing Agency funds through, among other things, unauthorized loans and salary advances. Pursuant to a directive by the Agency Board, the Agency was to implement administrative procedures in the summer of 1984 to monitor the SPIHB more closely. In addition, a legislative audit of the SPHIB was under way. Although there is some disagreement about when plaintiff was informed of the SPIHB problem, it is clear she was well aware of it during most of her tenure with the Agency.

As Indian Housing Coordinator, plaintiff was the Agency liaison with the SPIHB. She had to review the program budgets and correspond with the SPIHB executive director and staff regarding expenditures. Plaintiff's supervisor, Michael Haley, had ultimate responsibility for signing off on SPIHB budgets. Plaintiff became convinced that the SPIHB was misusing funds and voiced her displeasure to Haley and others in the fall of 1984. Throughout the fall, the Agency continued to fund the SPIHB and plaintiff continued

to voice her opposition to continued funding. It is fair to say that plaintiff's relationship with her supervisor was somewhat rocky and that the majority of the problem centered around SPIHB funding. Plaintiff was outspoken in her disagreements and on more than one occasion was reminded about protocol and proper channels.

On December 4, 1984, plaintiff drafted a memo that set forth numerous detailed abuses and deviations from the contract by the SPIHB. On December 7, 1984 she deposited envelopes into the mail at the Agency containing copies of the memorandum along with copies of the Legislative Auditor's Report which had been issued on December 4, 1984, which also outlined abuses. These envelopes were hand-addressed to members of the Indian community and to Senate Counsel. Plaintiff also claims to have put a memorandum on Haley's desk. Haley disputes receiving her memo. He asserts he became aware of the memo when he opened the envelope addressed to Senate Counsel after retrieving it from the outgoing mail pile. After reading the memo he retrieved the other handwritten envelopes and confronted the plaintiff. Haley informed plaintiff that she would have been fired immediately if she had succeeded in distributing the memorandum. He also told plaintiff that he considered the memo to be inaccurate, unnecessary and its distribution outside the Agency by the Agency's representative to the Indian community improper. Unbeknownst to Haley, plaintiff mailed the memorandum to six individuals outside the Agency including a union representative and members of the Indian community.

Due to plaintiff's actions the Agency, upon Haley's recommendation, extended plaintiff's probationary period rather than certify her for permanent employment. This was done pursuant to Section 7 of Article 16 of the MAPE agreement. In memoranda dated January 10, and January 14, 1985, to Henry Wesley, the personnel director at the Agency, Haley outlined the types of behavior plaintiff needed to correct. Plaintiff was given notice of these expectations and agreed to adhere to the conditions.

On January 18, 1985, the Agency was notified by staff

from the St. Paul American Indian Center that the December 7 memorandum had been widely distributed. The following week, the SPIHB contacted the Agency regarding the memo and threatened to sue. After an incident on Februrary 7, 1985, wherein plaintiff accused Haley of opening her mail, the Agency determined that plaintiff had been insubordinate and the working relationship had completely broken down. On February 15, 1985, plaintiff was non-certified and discharged from the Agency for "willful misconduct."

As provided for in the collective bargaining agreement, MAPE filed a third step grievance on behalf of plaintiff. Plaintiff subsequently met with her appointing authority, Agency Executive Director, James Solem, to discuss the reasons for her discharge. Solem affirmed the non-certification and discharge. The Agency then hired Donna Folstad, an American Indian woman who had held the position of Indian housing coordinator prior to plaintiff, to replace her.

Plaintiff has brought suit against the State of Minnesota, the Minnesota Housing Financy Agency, Executive Director James Solem, Personnel Director Henry Wesley and her supervisor Michael Haley. Plaintiff claims that their actions have violated her rights to free speech and due process thus entitling her to damages under 42 U.S.C. §1983. In addition, she alleges that noncertification and some of the terms and conditions of her employment were discriminatory in violation of Minn. Stat. §363.03 and 42 U.S.C. §§ 1981 and 1985(3). She also has alleged intentional infliction of emotional distress, defamation, unlawful discharge and violations of the collective bargaining agreement between MAPE and the State of Minnesota.

In June of 1987, plaintiff brought a motion for partial summary judgment. Defendants also brought a motion for summary judgment at that time. All motions were denied by the Honorable Patrick W. Fitzgerald of this court. The individual defendants, Solem, Wesley, and Haley, appealed the ruling, claiming the trial court should have held that they have qualified immunity from suit on plaintiff's First

Amendment claims. On February 23, 1988, the Minnesota Court of Appeals remanded the case to the trial court to specifically consider defendants' claims of qualified immunity.[1] Defendants are now before this court seeking partial summary judgment on plaintiff's First Amendment and Due Process claims on the basis of qualified immunity.

The standard for determining when a government official is entitled to immunity was articulated in *Harlow v. Fitzgerald*, 475 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 396 (1982). Government officials who perform discretionary functions are shielded from liability to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818, 102 S.Ct. at 2783. In explaining this standard, the *Harlow* Court stated:

> On summary judgment, the judge appropriately may determine, not only the current applicable law, but whether the law was clearly established at the time an action occured. If the law at that time was not clearly established, an official should not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. . . . If the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have knows of the relevant legal standard, the defense should be sustained.

Id. at 818-819, 102 S.Ct. at 2738.

In the instant case defendants do not contend that exceptional circumstances existed and thus the only question before this court is whether the applicable law was well established in 1985. With regard to the First Amendment free speech issue defendants contend that plaintiff's constitutional right to circulate an intra-agency memo outside of the agency in contravention of her supervisor's order and to speak out against the agency's

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[1] *McIntire v. State*, 419 N.W.2d 799, 803 (Minn. App. 1988).

policies and contradict her supervisor in open meetings was not "clearly established" in 1985. This court must agree.

To determine whether a public employee possesses free speech rights, the United States Supreme Court has required the use of a balancing test. *Pickering v. Board of Education*, 391 U.S. 563, 468, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). The interests to be balanced are those "of the [public employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* The Minnesota Supreme Court in *Finch v. Wemlinger*, 361 N.W.2d 865 (Minn. 1985) applied the *Harlow* analysis to a case in which a public employee claimed his First Amendment rights were violated by his discharge. Finch contacted four state senators whose committee assignments related to the Department of Economic Security where Finch worked and informed them of what he deemed to be illegal hiring practices in his division. The following day his supervisor terminated him. The Minnesota Supreme Court held that Finch had no clearly established constitutional right to continued employment under those circumstances.

In reaching this conclusion, the Minnesota court cited to the balancing test in *Pickering*, noting that in that case the Supreme Court had established only the basic perimeters of a public employee's free speech rights. *Finch*, 361 N.W.2d at 870. In fact, the *Pickering* Court itself stated:

> Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their supervisors, against whom the statements were directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.

Pickering v. Board of Education, 391 U.S. at 569, 88 S.Ct. at 1735, cited to in *Finch v. Wemlinger*, 361 N.W.2d at 879. In *Finch*, the court found that the need to maintain a close working relationship between superior and subordinate

called for trust, confidence and loyalty, and those considerations outweighed the employee's interest in commenting upon matters of public concern. *Finch* at 870-871. Such are the considerations apparent in the instant case.[2]

Plaintiff was in a confidential position with the Agency. It was her job as Indian Housing Program Coordinator to be the Agency's spokesperson to the Indian community. It was essential that the Agency have confidence that she would fairly and accurately represent its positions. Plaintiff's speech undermined that confidence. It is also obvious that plaintiff's conduct disrupted the day-to-day administration of the Indian Housing Program. Obviously, her contradictions undermined the Agency's ability to present a coherent position. Clearly, the interest of the Agency in efficiently performing its public services was seriously weakened by plaintiff's actions.

This is not to say that plaintiff's interests could not possibly outweigh those of the Agency, however, this court is convinced, given the fact situation, that the plaintiff's interests do not in any way override the Agency's interests. In assessing plaintiff's interests, this court does not believe that plaintiff was commenting upon matters of public concern as much as she was attempting to protect herself. She was fearful that any SPIHB funding abuses might be blamed on her and she was trying to avoid any misunderstandings. While the end result is that the public was made aware of the issue, this was not her sole motivation. Additionally, at the time plaintiff distributed the controversial memo, she knew that the legislative auditor's

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[2]The Court of Appeals on remand directed this trial court to "balance the interest of the agency, in promoting the efficiency of the public services it performs through its employees, against any right McIntire may have had to take action in the specific factual setting here." Citing *Finch*, it further directed the trial court to take into consideration "factors bearing on the smooth operation of the workplace —such as the maintenance of discipline by immediate supervisor and subordinate calling for trust, confidence and loyalty." *McIntire v. State*, 419 N.W.2d at 802.

report, citing SPIHB excesses, had already been released to the public, thereby diminishing any need on her part to disseminate the information.

Given the above considerations, it cannot be said that plaintiff possessed First Amendment free speech rights in this case. The applicable law was not well-established at the time of plaintiff's discharge, thus defendants Solem, Wesley and Haley must be afforded qualified immunity with respect to plaintiff's First Amendment claims.

Defendants Solem, Wesley and Haley have also asserted a qualified immunity defense with respect to plaintiff's due process claim. Plaintiff asserts that this matter is not properly before the court as this issue was not appealed and remanded by the Court of Appeals. However, since the Court of Appeals specifically remanded this case to analyze defendants' claim of qualified immunity and it is also its position that such determinations are appropriately resolved by summary judgment, this court will address the Due Process claim also.[3]

Plaintiff claims defendants violated her due process rights to liberty and property by not certifying her for permanent employment and terminating her without a pre-termination hearing. It is plaintiff's position that she had a protectable property interest in her job at the Agency. She contends that defendants sought to circumvent her procedural rights by continuing her probationary status in January 1985 rather than certifying her as a permanent employee. Had she been certified in January she would have been entitled to arbitration procedures upon her discharge in February. Defendants argue that plaintiff had no protected property interest in her job because she was a probationary employee, and without a protected property interest there can be no due process violation. Hence, their actions with respect to plaintiff are entitled to qualified immunity because they did not violate "clearly established" constitutional rights. Defendants take the position that the

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[3] *McIntire v. State, supra. See also Anderson v. City of Hopkins*, 400 N.W.2d 350, 354 (Minn. App. 1987).

law in this area was clearly established and that their action conformed with it. This court must agree with defendants.

To have a protected property interest in employment, a public employee must have "a legitimate claim of entitlment" to continued employment. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972). The existence of a legitimate claim of entitlement is determined by reference to state law and the employee's employment contract. *Bishop v. Wood*, 426 U.S. 341, 344-45, 96 S.Ct. 2074, 2077-78, 48 L.Ed.2d 684 (1976). State law provides: "There is no presumption of continued employment during a probationary period. Terminations or demotions may be made at any time during the probationary period . . ." Minn. Stat. §43A.16, subd. 2 (1986). Additionally, the Minnesota Court of Appeals in *Smith v. Hennepin County*, 383 N.W.2d 391 (Minn. App. 1986) held that a probationary employee was subject to dismissal at any time without right of appeal. *Id.* at 393. Thus, both statutory and case law in Minnesota clearly establish that a probationary public employee does not have a legitimate claim of entitlement to employment.

Looking to plaintiff's employment contract, the collective bargaining agreement, it is clear that plaintiff as a probationary employee, had no "legitimate claim of entitlement" to continued employment. Under the collective bargaining agreement, the appointing authority's discretion not to certify a probationary employee is not limited and there is a provision which specifically allows the appointing authority discretion to extend an employee's probationary period an additional 520 days. (Def. Ex.2). Thus, under both State law and her employment contract, plaintiff cannot claim a legitimate entitlement to employment and therefore has not been deprived of a property interest.

Plaintiff also argues that she has been deprived of a liberty interest because of her discharge from employment. She claims that she has suffered severe stigma and emotional distress in the Indian community as a result of her discharge and that it could have an adverse impact on her ability to take advantage of other employment

opportunities. Defendants argue that there hasn't been sufficient publication to infringe on plaintiff's liberty interests and further, if there was, they are still entitled to qualified immunity because under the *Harlow* analysis there was no clearly established law regarding how much process was due plaintiff.

To establish deprivation of a liberty interest via discharge from employment, an employee must demonstrate that, in connection with her discharge, her employer has made a charge "that might seriously damage [her] standing and associations in [her] community" or that is sufficient to impose "a stigma or other disability" that forecloses the employee from the freedom to take advantage of other employment opportunties. *Roth supra*, 408 U.S. at 573, 92 S.Ct. at 2707. *See also, Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155 (1976). Charges connected with dismissal can easily create such a stigma if they are publicized to the extent that other prospective employers may be deterred from hiring the individual. *Id.*

In the instant case, the reasons for plaintiff's non-certification have not been sufficiently published to implicate a liberty interest. The reasons for plaintiff's discharge are contained in her personnel file at the Agency. It is confidential information which has been shared with plaintiff, her union representative, the representative from Unemployment Compensation, and the Human Rights Department, the latter two at plaintiff's own request. Plaintiff alleges she was stigmatized in the Indian community but can offer no proof that defendants shared the reason for her discharge with anyone other than those persons listed above. Accordingly, no liberty interest has been implicated and defendants are entitled to qualified immunity.

Defendants have also brought a motion for summary judgment with respect to plaintiff's claims under the Minnesota Human Rights Act. They assert that plaintiff is unable to establish a prima facie case of discrimination. This court agrees.

The elements necessary to establish a prima facie case of

discriminatory discharge under the Minnesota Human Rights Act were set forth in *Hubbard v. United Press International, Inc.*, 330 N.W.2d 428 (Minn. 1983). The discharged employee carries the burden of establishing that: 1) she is a member of a protected class; 2) she was qualified for the job from which she was discharged; 3) she was discharged; and 4) the employer assigned a non-member of the protected class to do the same work. *Id.* at 442. The dispute herein centers around the fourth element. It is uncontroverted that after plaintiff was discharged, Donna Folstad, an American Indian female, was hired to replace her. Folstad is a member of the same protected class. Plaintiff makes some argument that other people filled plaintiff's position prior to the appointment of Folstad, but it is clear that they were simply other staff members who were "filling in" during the interim between plaintiff's discharge and Folstad's hiring.

Plaintiff also makes the argument that the fourth element should not be read literally. Rather, the court should take a more holistic approach and look at the workings of the entire Agency. It is plaintiff's contention that the Indian Housing Program is being treated differently than the other housing programs being run through the Agency. Plaintiff argues that the other housing programs were more structured and that the housing coordinators for those programs were given manuals and training. She asserts that the Indian Housing Program lacked a great deal of structure and that she, as Indian Housing Coordinator was given very little guidance and no program manual. It is her contention that his disparate treatment between the programs and thus between the housing coordinators is based upon race and this is sufficient to satisfy the fourth *Hubbard* element.

Plaintiff's argument must fail. While it may be true that the Indian Housing Program is run differently than the other housing programs, that is a separate issue from whether plaintiff was discriminatorily *discharged* because she was an American Indian. In order for this court to presume there was a discriminatory discharge, plaintiff

must meet the objective standard of showing she was replaced by someone other than an American Indian. This she cannot do.

With respect to plaintiff's claim of employment discrimination, in order to establish a prima face case plaintiff must not only show that she was treated differently from non-Indian housing coordinators, she must show some damage related thereto. She claims she did not have a suitable program manual and adequate training, but she never links this to any adverse result. She does not allege that because she had inadequate training she was unable to do her job and as a result had her probation extended. Nowhere does plaintiff connect her extension of probation to anything other than defendants' alleged desire to abridge her freedom of speech. Accordingly, defendants' motion for summary judgment with respect to plaintiff's discrimination claims based on the Minnesota Human Rights Act must be granted.

Lastly, defendants seek summary judgment with respect to plaintiff's 42 U.S.C. §§ 1981 and 1985(3) claims. Given the court's previous holdings, it is clear that these claims must also fail. Section 1981 establishes a substantive right to be free from retaliatory discharge. *Greenwood v. Ross*, 778 F.2d 448 (8th Cir. 1985). To establish a prima facie case a plaintiff must show: 1) statutorily protected participation, 2) adverse employment action, and 3) a causal relationship between the two. *Id.* at 456. *See also, McDonnell Douglas*, 411 U.S. at 802-04, 93 S.Ct. at 1324-25. As has been discussed previously, plaintiff's conduct was not protected by the First Amendment, nor can she show discrimination, thus, plaintiff is unable to satisfy the first element. She cannot establish a prima facie case under § 1981 and as a consequence defendants' motion for summary judgment must be granted.

As to plaintiff's § 1985 claim of conspiracy by defendants to deprive her of her freedom of speech and due process rights, it too must fail. Having already determined that defendants did not deprive her of these rights, there can

obviously be no conspiracy to do so. Accordingly, defendants' motion for summary judgment must be granted.

B.A.N.

State of Minnesota

In Supreme Court

C6-89-2265

Marcie McIntire,

Appellant,

v.

The State of Minnesota, Minnesota Housing Finance Agency, James Solem, Individually and in his Official Capacities as its Executive Director; Henry Wesley, Individually and in his Official Capacities as its Personnel Director; and Michael Haley, Individually and in his Official Capacities as Director of Home Mortgage Program,

Respondents.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Marcie McIntire for further review be, and the same is, denied.

Dated:
9-28-90

BY THE COURT:

Chief Justice

APPENDIX E

1) 42. U.S.C. Section 1983, civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2) First Amendment of the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacebly to assemble, and to petition the Government for a redress of grievences.

3) Fourteenth Amendment of the United States Constitution, in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No. 90-1057 (2)

Supreme Court, U.S.
FILED
JAN 23 1991
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

MARCIE MCINTIRE,

Petitioner,

v.

THE STATE OF MINNESOTA, MINNESOTA HOUSING FINANCE AGENCY, JAMES SOLEM, individually and in his official capacity as its Executive Director; HENRY WESLEY, individually and in his official capacities as its Personnel Director; and MICHAEL HALEY, individually and in his official capacities as Director of Home Mortgage Program,

Respondents.

Petition For Writ Of Certiorari To The Minnesota Court Of Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the grant of summary judgment based on qualified immunity conflict with federal appellate precedent where the court relied on sufficient uncontroverted facts from which a reasonable official could conclude that terminating petitioner's employment would not violate her first amendment rights?

2. Does an allegation that a public employee's termination infringed her first amendment free speech rights create procedural due process rights where there is no protectable property interest in continued employment under state law?

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No. 90-1057

In The

Supreme Court of the United States

October Term, 1990

MARCIE MCINTIRE,

Petitioner,

v.

THE STATE OF MINNESOTA, MINNESOTA HOUSING FINANCE AGENCY, JAMES SOLEM, individually and in his official capacity as its Executive Director; HENRY WESLEY, individually and in his official capacities as its Personnel Director; and MICHAEL HALEY, individually and in his official capacities as Director of Home Mortgage Program,

Respondents.

Petition For Writ Of Certiorari To The Minnesota Court Of Appeals

BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Minnesota Court of Appeals' opinion in this case. That opinion is reported at 458 N.W.2d 799 and is reproduced in the Appendix to the petition at A-1.

STATEMENT OF THE CASE

On July 2, 1984, the Minnesota Housing Finance Agency ("Agency") hired petitioner Marcie McIntire ("McIntire"), an American Indian woman, as the Indian Housing Coordinator in the Agency's Home Mortgage Division. Second Amended Complaint ("2d Am. Compl."), ¶4. The duties of the Indian Housing Coordinator were to oversee the day to day administration of Agency funds to the several urban and outstate Indian housing programs and to act as the Agency's representative to the administrators of these programs and the Indian communities they served. Deposition of Michael Haley ("Haley Dep.") at 13, Appellants' Appendix (filed in Minnesota Court of Appeals) ("App.") at 265; Deposition of Marcie McIntire ("McIntire Dep.") at 21-22, App. at 101-02. McIntire was hired as a probationary employee under state law and the collective bargaining agreement between the State of Minnesota and the Minnesota Association of Professional Employees ("MAPE"). 2d Am. Compl., ¶4, App. at 2; Haley Dep. at 13-14, App. at 265-66; MAPE Agreement, Art. 16, § 7, App. at 393.

One of the ongoing issues at the Agency at the time McIntire was hired was its relationship with one of the Indian housing programs run by the St. Paul Intertribal Housing Board ("SPIHB"). In the spring of 1984, the Agency had investigated reports that SPIHB had been misusing Agency funds through, among other things, unauthorized loans and salary advances. At the June, 1984, meeting of the Agency Board, the Agency staff informed the Board of these misuses. The Board directed the Agency to implement administrative procedures to

more closely monitor the program and to recover misused funds. Deposition of James Solem (Solem Dep.) at 50-59, Respondent's Appendix (filed in Minnesota Court of Appeals) ("Resp. App.") at 90-99; Haley Dep. at 112-14, Resp. App. at 67-69. In July, when McIntire started with the Agency, the Agency was carrying out the Board's directions. In addition, a legislative audit of the SPIHB was under way. During most of her tenure with the Agency, McIntire was aware of the problems with the SPIHB and the steps the Agency was taking to correct the problems. McIntire Dep. at 75-80, Resp. App. at 38-43.

As Indian Housing Coordinator, McIntire was the liaison with the SPIHB. Position Description of Indian Housing Coordinator, App. at 56-60. She had to review the program budgets and correspond with the SPIHB executive director and staff regarding expenditures. Her supervisor, Michael Haley, had ultimate responsibility for signing off on SPIHB projects. McIntire Dep. at 97, App. at 128; Position Description of Indian Housing Coordinator at I.B., App. at 57. In August, 1984, McIntire became concerned that at some future date she might be held accountable for misuses of funds by the SPIHB. She went to a MAPE representative, Jane Ritche, who advised her to document her disagreement with further funding of the SPIHB in order to protect herself from future liability. McIntire Dep. at 94-95; App. at 125-26.

During her initial months of employment, McIntire made several public statements which her supervisors viewed as inappropriate given her status as the Agency representative to the Indian community. In late August, 1984, McIntire made an unsubstantiated statement at a tribal meeting indicating that the State Auditor had a

conflict of interest in auditing one of the urban Indian programs. McIntire Dep. at 109-11, App. at 139-41. At a public meeting on September 4, 1984, with a representative of the Urban Indian Advisory Counsel, McIntire made a statement which clearly implied that the SPIHB was a group of sophisticated embezzlers. McIntire Dep. at 121-22, App. at 143-44. On September 27, 1984, McIntire contradicted her supervisor at an Agency board meeting. Haley later clarified with McIntire the protocol for Agency staff to speak at Agency Board meetings and asked her to communicate her ideas to him prior to the Board meeting in the future. McIntire Dep. at 139-41, Resp. App. at 45-47.

During the fall of 1984 the Agency was progressively severing its ties with SPIHB. At its October 25, 1984, meeting, the Board decided to reject the SPIHB's proposal for future funding based on past practices. The Agency continued funding the SPIHB on a contract that was then in place. Haley Dep. at 89-90, App. at 311-12.

On December 4, 1984, the Legislative Auditor issued a report on the SPIHB confirming funding abuses. App. at 610-82. After consulting with the Agency's Executive Director James Solem, Haley called the Executive Director of the SPIHB on December 6, 1984, and informed her that the Agency would no longer fund their current contract. McIntire Dep. at 170-72, App. at 178-80; Haley Dep. at 102-03, Resp. App. at 65-66. McIntire read the Legislative Auditor's report on December 5 or 6, 1984. McIntire Dep. at 170, App. at 178.

McIntire drafted a memorandum, dated December 4, the same date as the Legislative Auditor's report was

issued, that set forth numerous detailed abuses and deviations from the contract by the SPIHB.[1] App. at 83-91. Although the memo was addressed to Haley, McIntire did not give it to him. Instead, on December 7, 1984, she attempted to distribute copies of her December 4 memorandum to Senate Counsel and to members of the Indian community by depositing them in the Agency mail. Haley Dep. at 67, Resp. App. at 56.

Haley noticed an envelope that had been addressed in handwriting to Senate Counsel, retrieved it so that the address could be typewritten, and, upon opening it, discovered McIntire's December 4 memorandum. Haley Dep. at 67 and 92, Resp. App. at 56 and 61. He had never seen the December 4 memorandum before, nor had McIntire discussed with him the contents of the memorandum prior to attempting to distribute it. Haley Dep. at 67, Resp. App. at 56; McIntire Dep. at 178, App. at 183.

After reading the memorandum, Haley confronted McIntire. He informed McIntire that she would have been fired immediately if she had succeeded in distributing the

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[1] The Court of Appeals noted that McIntire's reason for writing the memorandum was the advice she had received from her MAPE union representative to document her disagreement with further funding of the SPIHB in order to protect herself from future liability. *McIntire v. State*, 458 N.W.2d 714, 717 (Minn. Ct. App. 1990), Petitioner's Appendix ("Pet. App.") at A-7. McIntire now claims, at page 4 of her petition for writ of certiorari, that she was "advised by Senate Counsel to prepare a memorandum detailing the problems with the SPIHB." To respondents' knowledge, this latter statement is not supported by the record below.

memorandum. Haley considered the memorandum inaccurate, unnecessary and its distribution outside the Agency by the Agency's representative to the Indian community to be improper. Haley Dep. at 68-69, 99-103, Resp. App. at 57-58, 62-66. McIntire then retrieved the additional copies. Haley Dep. at 69, Resp. App. at 58.

Approximately one hour after this conversation with Haley, McIntire mailed the memorandum, without Haley's knowledge, to several individuals outside the Agency, including Senate Counsel, a union representative, and members of the Indian community. McIntire Dep. at 179-81, App. at 184-86.

Due to McIntire's actions, but without knowledge of her surreptitious distribution of the December 4 memorandum, the Agency extended McIntire's probationary period instead of certifying her for permanent employment. This was done pursuant to the MAPE agreement. App. at 393. In memoranda dated January 10, 1985, and January 14, 1985, Haley outlined the types of behavior plaintiff needed to correct in order to be certified for employment. App. at 47 and 51.

After McIntire's probation was extended, Haley learned that McIntire's internal memorandum had been widely distributed. Haley Dep. at 76-77, Resp. App. at 59-60. The Agency determined that McIntire had been insubordinate and the working relationship had completely collapsed. On February 15, 1985, McIntire was non-certified and discharged from her position with the Agency for "willful misconduct." Memorandum of February 15, 1985, App. at 52.

In accordance with the collective bargaining agreement, MAPE filed a grievance on behalf of McIntire. The non-certification and discharge were affirmed. Wesley Affidavit and Attachments, Resp. App. at 73-84. The Agency then hired Donna Folstad, an American Indian woman, to replace McIntire. 2d Am. Compl., ¶36, App. at 7.

McIntire commenced this action in state district court. In June, 1987, McIntire brought a motion for partial summary judgment. Defendants also brought a motion for summary judgment. All motions were denied, and the individual defendants appealed. The Minnesota Court of Appeals remanded the case to the trial court to specifically consider defendants' claims of qualified immunity. *McIntire v. State*, 419 N.W.2d 799 (Minn. Ct. App. 1988), *rev. denied*, No. C6-89-2265 (Minn. April 20, 1988) (reproduced in Petitioner's Appendix at B-1). On remand, the district court granted summary judgment on qualified immunity grounds for the individual defendants, and the Minnesota Court of Appeals affirmed. The Minnesota Supreme Court denied review of the Minnesota Court of Appeals' decision on September 28, 1990. The Petition for Writ of Certiorari to the Minnesota Court of Appeals ("Pet.") was received by Respondents on December 27, 1990.

REASONS FOR DENYING THE PETITION

McIntire relies on the language of Rule 10.1(b) of the Supreme Court Rules as the reason why the Court should

grant review of the Minnesota Court of Appeals' decision. Under that rule the Court may review a decision if a "state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." McIntire argues that the Minnesota Court of Appeals' decision in this case conflicts with existing federal appellate authority. However, the Minnesota Court of Appeals' opinion properly identified and applied existing federal appellate authority, and there is no conflict among the courts.

I. Granting Of Summary Judgment Based On Qualified Immunity Did Not Conflict With Federal Appellate Precedent Where The Court Relied On Sufficient Uncontroverted Facts From Which A Reasonable Official Could Conclude That Terminating Petitioner's Employment Would Not Violáte Her First Amendment Rights.

Petitioner's first amendment claim is that she was fired for exercising her protected right to free expression. She agrees with the court below that *Pickering v. Board of Education*, 391 U.S. 563 (1968), provides the analytical construct in which her claim must be evaluated. Furthermore, petitioner agrees that under *Pickering* the court must balance "the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pet. at 8 (quoting *Lewis v. Harrison School District #1*, 805 F.2d 310, 313 (8th Cir. 1986), quoting *Pickering*, 391 U.S. at 568.) Petitioner agrees further that

the *Pickering* balancing requires consideration several specific factors:

1. The need for harmony in the office or work place;
2. Whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or could cause the relationship to deteriorate;
3. The time, manner and place of the speech;
4. The context in which the dispute arose;
5. The degree of public interest in the speech;
6. Whether the speech impeded the employee's ability to perform his or her duties.

Pet. at 8-9. These are precisely the principles applied by the Minnesota Court of Appeals.

Petitioner's contention that the decision below is in conflict with federal appellate authority is based on the narrow proposition that in weighing the factors in the *Pickering* balancing, the court should have allowed her a jury trial, rather than granting summary judgment. Specifically, petitioner argues:

> [T]he Minnesota Court of Appeals chose not to follow established federal precedent in its holding and, instead, determined that the question of whether there was office disruption or a need for loyalty and trust could be determined by the Court without submission to a jury. See *McIntire v. State*, 458 N.W.2d 714, 718 (Minn. App. 1990), n.3.

Pet. at 10. Petitioner asserts that these *Pickering* factors "must be submitted to the jury." *Id.*

The flaws in this argument are illustrated by reference to the very footnote of the court of appeals decision cited by petitioner. In footnote 3 of the opinion, the court explained, in pertinent part:

> Ordinarily, the question of whether there is office disruption or a need for loyalty and trust is a jury matter. [Citation omitted.] Here, however, *the facts peculiar to this case are sufficiently uncontroverted* so that jury findings are unnecessary *in the context of an immunity determination.*

McIntire, 458 N.W.2d at 718 n.3; Pet. App. at A-9 (emphasis added). The decision of the court below that a jury trial was unnecessary was based on (a) the facts peculiar to this case, (b) which it determined were sufficiently uncontroverted (c) in the context of an immunity determination. These three factors, all ignored by petitioner, all militate against review by this Court.

First, the decision below was limited to and conditioned upon the "facts peculiar to this case." This Court need not devote its precious time to a determination whether the state court properly evaluated this specific factual situation.

Second, the court below did not contradict federal precedent that requires a jury trial where there are genuine issues concerning the factual aspects of the *Pickering* balancing. Rather, it made a determination, specific to the facts of this case, that here there were sufficient *uncontroverted* facts upon which to base its decision, without the aid of a jury. Not one of the cases relied on by petitioner stands for the proposition that a trial is necessary on the *Pickering* factors where the material facts are not in dispute. Obviously such a principle would fly in

the face of all of this Court's summary judgment jurisprudence. *See, e.g., Celotex v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Finally, petitioner ignores that the court's determination was made in the context of a qualified immunity analysis. As the court below noted: "Balancing these interests in the context of qualified immunity moves the fulcrum on which the decision turns." *McIntire*, 458 N.W.2d at 718; Pet. at A-9. Petitioner fails to appreciate that the qualified immunity context is significant in several ways.

First, this Court has emphasized that the purpose of its shift to an objective test based on clearly established rights was to facilitate resolution of qualified immunity issues without trial. *E.g., Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). Therefore, it was certainly consistent with this Court's teachings for the court below to determine whether there were sufficient undisputed facts on which to base qualified immunity.

Second, the inquiry in a summary judgment motion based on qualified immunity is different from that based on the merits of the case. A court can grant summary judgment on the merits of a case only if it can conclude, based on the factual material properly presented, that no reasonable fact-finder could rule for the non-moving party. *E.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In contrast, a summary judgment motion based on qualified immunity requires the court to determine whether, based on the facts of the particular case, any

reasonable official could have thought that the defendant's action was lawful. *Anderson v. Creighton*, 483 U.S. 635 (1987).[2] The Court stated in *Creighton*:

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Id. at 640. Thus, the Court explained:

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[2] Petitioner demonstrates her misunderstanding of the qualified immunity test by asserting that the Court should grant certiorari "to uphold the proposition that the right to speak out about breach of public trust without retaliation was clearly established in 1985." Pet. at 12. The Court in *Creighton* held that the qualified immunity issue cannot properly be framed based on such sweeping generalities. 483 U.S. at 639. The necessity for reference to the facts at hand in the qualified immunity inquiry is even greater in cases such as this involving the conflict between public employment and the first amendment. As petitioner herself noted, this Court explained in *Pickering*:

> Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be sought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.

391 U.S. at 569 (quoted in Pet. at 7). Thus, the Court refused to state a general standard clearly establishing the circumstances in which termination of a public employee would violate free speech rights.

> The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed.

Id. at 641.

It follows that the proper inquiry for the Minnesota courts in the instant case was whether it was clearly established that in the circumstances of this case terminating petitioner's employment would violate her first amendment rights. Stated another way, if there were sufficient undisputed facts from which a reasonable official could conclude that firing petitioner would be permissible under the *Pickering* balancing, summary judgment based on qualified immunity would be proper.

In this context, the decision of the Minnesota Court of Appeals affirming summary judgment based on qualified immunity was plainly correct, as well as consistent with the precedent of this Court and the federal courts of appeal. The court found that there were sufficient uncontroverted facts from which a reasonable official could conclude that terminating petitioner's employment would not violate clearly established rights.

At a minimum, the following facts are absolutely beyond dispute: Petitioner attempted to distribute publicly a memorandum addressed to her supervisor without showing it to him. After her supervisor discovered the memo and specifically directed petitioner not to distribute it, she did so anyway and concealed her action from him. The alleged fiscal mismanagement by the SPIHB that was the subject of the memo had already been publicly

reported by the Legislative Auditor at the time petitioner distributed her memo. The Housing Finance Agency had rejected future funding for the SPIHB several months before petitioner's memo and had discontinued all current funding to the Board the day before petitioner distributed her memo. Not one of these facts was controverted by petitioner.

The court below was plainly correct in determining that a reasonable official could conclude in such circumstances the interests of the public employer outweighed petitioner's first amendment interest in disseminating her memo. In the context of the qualified immunity issue, the inquiry was not whether a fact-finder could possibly find for petitioner. Rather, the salient question was whether any competent public official could conclude that termination would not violate petitioner's rights. Given petitioner's undisputed direct insubordination to her superior, plainly the court below was correct in affirming qualified immunity.

Petitioner attempts to clothe her claim in the mantle of a conflict in principle between the court below and the federal courts. However, in reality she presents nothing more than a dispute about the specific facts of this case and whether the court of appeals correctly determined that there were sufficient uncontroverted facts on which to base qualified immunity. There is no conflict among the courts, and the fact-specific resolution of the qualified immunity issue does not warrant review by this Court.

II. An Allegation That A Public Employee's Termination Infringed Her First Amendment Free Speech Rights Does Not Create Procedural Due Process Rights Where There Is No Protectible Property Interest In Continued Employment Under State Law.

McIntire asserts that this Court should grant review in order to safeguard due process rights of probationary public employees to employment and opportunity for continued employment without discharge because of their speech. Despite the fact that the state court of last resort found that McIntire failed to demonstrate a protectable property interest, *McIntire*, 458 N.W.2d at 719, Pet. App. at A-10, McIntire asks this Court to find that she was entitled to procedural due process. The source of that right, according to McIntire, is the fact that she alleged that her termination infringed her first amendment free speech rights.

Petitioner relies on *Perry v. Sindermann*, 408 U.S. 593 (1972), to argue that procedural due process was required in this case because she alleged that her first amendment rights were infringed by her termination. Petitioner cites *Perry* for the proposition that "lack of a contractural [sic] or tenure right to employment does not defeat a claim that the non-renewal of such employment violates one's rights under the First and Fourteenth Amendment." Pet. at 15. Petitioner's reliance on this aspect of the *Perry* opinion in support of her due process argument is misplaced. The Court did, indeed, hold in *Perry* that lack of a contractual or tenure right to employment would not defeat Perry's claim that he was terminated in violation of his first amendment rights. *Perry*, 408 U.S. at 596-98.

However, that was in the discussion of Perry's first amendment claim, not his due process claim. The Court explained that: "The respondent's lack of formal contractual or tenure security in continued employment . . . , though irrelevant to his free speech claim, is highly relevant to his procedural due process claim." *Id.* at 599. The Court reiterated what it held the same day in *Board of Regents v. Roth*, 408 U.S. 564 (1972), that property interests protected by due process are not created by the constitution, but by state law. *Perry*, 408 U.S. at 602 n.7. Here, the state law question of petitioner's property right to continued employment has been conclusively decided against her by the state courts. That issue "does not raise a federal question appropriate for review by this Court." *Agins v. City of Tiburon*, 447 U.S. 255, 259 n.6 (1980).

Petitoner's argument that her assertion that she was fired in violation of her free speech rights entitled her to procedural due process was rejected in *Roth* and *Perry*. The Court in *Perry* stated:

> The Court of Appeals suggested that the respondent might have a due process right to some kind of hearing simply if he *asserts* to college officials that their decision was based on his constitutionally protected conduct. [Citation omitted.] We have rejected this approach in Board of Regents v. Roth, 408 U.S. at 575 n.14.

408 U.S. at 599 n.5 (emphasis in original). Thus *Perry* does not stand for the proposition that an allegation of infringement of free speech rights creates a due process entitlement where state law does not establish a protectable property interest in continued employment. It stands for precisely the opposite.

Petitioner has identified no contrary authority nor advanced any reasons why the Court should reconsider this settled issue. Accordingly, there is no basis for review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: January, 1991

Respectfully submitted,

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Respondents.

Petition For Writ Of Certiorari To The Minnesota Court Of Appeals

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QUESTIONS PRESENTED

I. Can a state court weigh factual issues on Summary Judgment, in conflict with federal appellate authority, under the *Pickering* balancing test for qualified immunity on claims for violation of a public employee's free speech rights under 42 U.S.C. Section 1983 and the First and Fourteenth Amendments to the United States Constitution?

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PETITIONER'S REPLY BRIEF

Petitioner Marcie McIntire respectfully prays this Court to issue a Writ of Certiorari to review the opinion of the Court of Appeals of Minnesota dated August 7, 1990 reported at 458 N.W. 2d 799 and found in the Appendix at A-1.

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner, Marcie McIntire, submits additional facts in response to the Brief in Opposition to her Petition for Writ of Certiorari. This case contains disputed *Pickering* factors that the Court determined rather than submitting them to the jury.

First, contrary to Respondents' Brief in Opposition at page 14, the Minnesota Housing Finance Agency (MHFA) did not cut off the St. Paul Intertribal Housing Board's (SPITHB) funding *before* Petitioner distributed her memorandum of December 4, 1984, but did so *after*. At a December 20, 1984 meeting of the Board of Directors of the MHFA, the Agency Board recommended no additional administrative funds to the SPITHB. (December 20, 1984 MHFA Board minutes, A-353). This was, in fact, several days after distribution of Petitioner's memorandum. Respondents' claims at page 4 of their Brief in Opposition that "after consulting with the Agency's Executive Director James Solem, Haley called the Executive Director of the SPITHB on December 6, 1984, and informed her that the Agency would no longer fund their current contract" is not supported by the record. The termination of the relationship between the MHFA and SPITHB was a Board decision made the third week of December. (McIntire depo. at 170; A-178). The Minnesota Court of Appeals in *McIntire I*, misconstrued this factual chronology as indicated in its first opinion in this case. See *McIntire v. State*, 419 N.W. 2d 799 at B-6.

Despite the SPITHB funding abuses, the Agency continued to recommend funding the SPITHB during Ms. McIntire's employment at the Agency. (Haley depo., pp.

89-90; A-311-12). The Agency continued to disburse state funds to the SPITHB through December, 1984. (A-360-1). Haley personally authorized disbursement of $33,266.94 to the SPITHB on December 3, 1984. (A-360). The MHFA Board of Directors eventually voted to discontinue funding the SPITHB despite the recommendation of the Agency staff to continue funding. (A-94).

Respondents' statement at page 14 of their Brief in Opposition that "the Housing Finance Agency had rejected future funding for the SPITHB several months before Petitioner's memo and had discontinued all current funding to the Board the day before Petitioner distributed her memo" is simply not supported by the record. (See December 20, 1984 MHFA Board minutes, A-353; Affidavit of Petitioner, A-94; McIntire depo., page 170).

Second, it remains disputed whether Petitioner's memorandum was "widely distributed" within the Indian community and the effect this had on the functions of the Agency. Petitioner's successor at the Agency, Donna Folstad, indicated she did not advise Haley that Petitioner's memorandum was "widely distributed". (Folstad depo., p. 73, A-352). This is despite Haley's indications that Ms. Folstad made the representation. Haley conducted no independent investigation into the allegations of distribution of the memorandum. (Haley depo., p. 80, A-305). Haley's apparent sole source of his claim the memorandum was "widely distributed" was hearsay from Tom Goldtooth. Haley never conferred with Petitioner about claims that her memorandum had been "widely distributed" within the community. (Haley depo., p. 80, A-305). Moreover, Haley stated he was not

concerned about reaction of members of the Indian community. (Haley depo., p. 79, A-304).

Finally, the January 10 and 14, 1985 memos to Ms. McIntire were to operate prospectively from those dates forward. (Solem depo., p. 83). Haley had no personal knowledge as to the dates of the distribution of Petitioner's memorandum. (Haley depo., p. 79-80; A-304-5). Similarly, Respondent Henry Wesley had no knowledge of any events occurring after January 14, 1985 upon which to base Petitioner's termination. (Wesley depo., p. 79, A-254). Petitioner received a favorable unemployment determination from the Minnesota Department of Economic Security when Respondents could not indicate any events justifying "willful misconduct" after January 14, 1985.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari When Disputed Factual Issues of the *Pickering* Balancing Test are Determined by a State Court Upon Summary Judgment in Conflict with Existing Federal Appellate Authority.

Marcie McIntire's reply to Respondent's Brief in Opposition is twofold. First, certain facts characterized as "absolutely beyond dispute" are disputed; and secondly, Respondents unnecessarily focus upon facts not germane to the *Pickering* balancing factors set forth in the Petition for Writ of Certiorari at pages 8-9. (Resp. Br. in Opp. -9). Respondents do not deny the importance of the conflict created by the Minnesota Court of Appeals' analysis of

the *Pickering* balancing test from existing federal appellate court authority. Instead, Respondents opt to justify a state court's alteration of established federal authority on qualified immunity in the public employment free speech context.

The Court of Appeals utilized facts taken from its earlier opinion in *McIntire I*. See A-6. Those facts, as indicated above, were in dispute. Indeed, the Court of Appeals' findings in *McIntire I* (at B-6) that the MHFA cut off the board's findings *before* McIntire distributed her memo and that the legislative auditor's report came out several days *before* are not supported or referenced in *McIntire II*.

Respondents avoid the critical issues of a state court making credibility determinations, weighing evidence, drawing inferences from testimony and evidence, instead of a jury as federal courts require. Self-serving statements made by Michael Haley, James Solem, and Henry Wesley demand evaluation by a jury rather than *de novo* review by the Minnesota Court of Appeals. Examination of Respondents' and the Minnesota Court of Appeals' focus reveals the need to submit the *Pickering* balancing factors to the jury for proper evaluation as dictated by federal caselaw.

First, the nature of the Minnesota Court of Appeals' opinion, as well as Respondents' arguments, identify the problems inherent in having the Court determine the *Pickering* balancing factors rather than a jury. Courts are not equally equipped to evaluate credibility of witnesses upon appeal, disruption of office operations, disharmony among co-workers or breach of a confidential working

relationship, and motivation of the employer for terminating the employee. It is difficult to conceive of a scenario whereby the employee's supervisor (such as Haley) can provide objective non-biased evidence on the above factors. Clearly the interest of Haley, Solem, and Wesley, as Defendants to the lawsuit, dictates that issues of credibility, truthfulness, and evidentiary weight should be determined by the jury. By removing the consideration of the six *Pickering* factors from the jury, the Minnesota Court of Appeals has effectively undermined established federal appellate authority holding the balancing of the underlying factual issues is a jury function. See Petition for Writ of Certiorari at 8-11. Respondents ignore caselaw set forth by the federal appeals courts and, instead, focus upon superfluous facts. The same balancing of the *Pickering* factors should take place in state court and federal court for claims brought by public employees for violation of 42 U.S.C. Section 1983 and the First and Fourteenth Amendments.

Assuming *arguendo* Marcie McIntire's pre-memo statements and December 4, 1984 memorandum were inaccurate, such speech is nevertheless protected. *New York Times v. Sullivan*, 476 U.S. 254 (1964). Qualified immunity does not permit Respondents to ignore the *Pickering* factors and rely on extraneous statements to justify their conduct. The federal courts have recognized such a distinction.

The Minnesota Court of Appeals' ruling conflicts with existing federal appeals court precedent that requires the *Pickering* balancing factors to be submitted to the jury rather than for the Court to determine. See Petition for Writ of Certiorari at 13. Petitioner asserts a

claim based upon violation of 42 U.S.C. Section 1983 and rights secured by the First and Fourteenth Amendments to the United States Constitution. Plaintiffs such as Marcie McIntire are entitled to the same protections under 42 U.S.C., and the First and Fourteenth Amendments to the United States Constitution, in both state and federal courts. All public employees, such as Marcie McIntire, are entitled to receive the same consideration of their claims for violation of 42 U.S.C. Section 1983 and the First and Fourteenth Amendments regardless of whether it is asserted in state or federal court. Certiorari should be granted to resolve the conflict that exists in application of the *Pickering* balancing test in state and federal courts.

CONCLUSION

For all of the above reasons, Petitioner Marcie McIntire respectfully requests that the Supreme Court grant her Petition for Writ of Certiorari.

Respectfully submitted,

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